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No.

# In the Supreme Court of the United States

PETER BROOKS, DAVID T. GIES, PATRICIA CLEMMER PETERS, ROBIN B. HEATWOLE, DRY COMAL CREEK VINEYARDS, HOOD RIVER VINEYARDS, AND SCHNEIDER LIQUOR COMPANY, INC.,
*Petitioners*,

v.

ESTHER H. VASSAR, Chairman, Virginia Department of Alcoholic Beverage Control; PAMELA O'BERRY EVANS, Commissioner, Virginia Department of Alcoholic Beverage Control; SUSAN R. SWECKER, Commissioner, Virginia Department of Alcoholic Beverage Control; AND VIRGINIA WINE WHOLESALERS ASS'N, INC.,
*Respondents*.

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit**

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTION PRESENTED

In *Granholm* v. *Heald*, 544 U.S. 460, 466 (2005), the Court struck down state statutes that allowed in-state wineries to sell wine directly to consumers but made direct sales "impractical from an economic standpoint" for out-of-state wineries. The Court held that those laws discriminated against interstate commerce and were "neither authorized nor permitted by the Twenty-first Amendment." *Ibid.* The questions in this case are:

1. Whether Virginia impermissibly discriminates against interstate commerce when it allows residents virtually unrestricted access to certain alcoholic beverages sold by Virginia retailers but severely curtails residents' access to the same products sold by out-of-state retailers.

2. Whether the "market participant exception" to the dormant Commerce Clause authorized Virginia to sell only wine produced in-state at State-owned retail liquor stores that have a state-mandated monopoly on the sale of hard liquor in the State.

## RULE 29.6 STATEMENT

None of petitioners has a parent company and no publicly held company owns 10% or more of the stock of any of the petitioners.

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## OPINIONS BELOW

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## JURISDICTION

The judgment of the court of appeals was entered on September 11, 2006. On December 1, 2006, Chief Justice Roberts extended the time for filing a petition for a writ of certiorari to February 8, 2007. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant portions of the Commerce Clause and the Twenty-First Amendment to the United States Constitution, and of Virginia Code §§ 4.1-100, 4.1-119, 4.1-310, and 4.1-311 are reprinted in the appendix to this petition at 99a-100a.

## STATEMENT

This case concerns two provisions of Virginia law that discriminate against interstate commerce. The first provides that a Virginia resident may purchase and transport for personal use within the State *unlimited* quantities of wine and beer that were purchased in-state, but may transport for personal use within Virginia only a *single* gallon of wine or beer that was purchased out-of-state. The manifest effect of this provision is both to place out-of-state retailers at a severe competitive disadvantage and effectively to exclude Virginia residents from participation in the interstate retail wine market. This Court invalidated very similar state laws in *Granholm* v. *Heald*, 544 U.S. 460 (2005), holding unconstitutional regulations that made it "economically impractical" for out-of-state wineries to sell wine directly to in-state customers. A divided panel of the Fourth Circuit nevertheless upheld the

Virginia provision at issue in this case because it believed that the Twenty-First Amendment allows states to require that all alcohol consumed in-state be purchased domestically.

The second provision concerns Virginia's state-owned "ABC stores." The State has given these stores a monopoly on the sale of hard liquor in Virginia. The stores also sell wine – but only "farm wine" produced in Virginia. As a consequence, Virginia residents who want to purchase liquor and wine at a single location *must* purchase Virginia wine. Although the Fourth Circuit acknowledged that this regime discriminates against out-of-state wineries and that the ABC stores monopolize the liquor market, it held the provision constitutional under the market-participant exception to the Commerce Clause.

Both aspects of the Fourth Circuit's holding warrant this Court's attention. The first element of the decision below upheld a state law that makes it impossible for out-of-state wine and beer retailers to compete for the business of Virginia residents, while effectively keeping Virginians from crossing state lines to make their purchases. This holding misstates compelling constitutional policy and is flatly inconsistent with *Granholm*. The Fourth Circuit's market-participant decision, meanwhile, allows a state to leverage regulatory control over a market into a competitive advantage for domestic businesses. Because these rulings reflect a misunderstanding of principles announced by this Court, contribute to confusion in very important areas of the law that touch on essential state regulatory authority, and – not least – uphold unconstitutional state laws of considerable significance, review by this Court is warranted.

1. Virginia tightly controls all alcoholic beverages intended for sale and distribution in the State. Virginia requires most wine or beer sold or distributed within the state to pass through a three-tier system of producers, wholesalers, and

retailers.[1] State law permits Virginia residents to purchase and transport unlimited amounts of wine and beer from in-state retailers.[2] Virginians also may produce and consume unlimited amounts of wine and beer at home without a license if it is for personal or family use. See *id.* § 4.1-200(6). In contrast, Virginia residents may import or transport for personal use no more than *one gallon* (or four liters) of wine, beer, or liquor purchased out-of-state. *Id.* § 4.1-310, -311 (the "personal import limit").

The State's strictest controls apply to hard liquor, which producers may sell or transport only to the Alcoholic Beverage Control ("ABC") Board. See Va. Code Ann. § 4.1-206(1). All liquor imports must go to the ABC Board or to licensed distilleries. See *id.* § 4.1-310(A). The ABC Board also operates "ABC stores," which are virtually the only places in Virginia that people may lawfully buy liquor to drink off-site. See *id.* §§ 4.1-103, -119, -206, -303. The State permits ABC stores to sell only one type of wine: Virginia "farm wine." See *id.* § 4.1-119 (the "ABC stores restric-

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[1] The three-tier system is "a separation between manufacturing interests, wholesale interests and retail interests in the production and distribution of alcoholic beverages." Va. Code Ann. § 4.1-215(C). Market participants must choose one level: production, wholesale, or retail. Within Virginia, wine or beer producers may sell and ship only to wine or beer wholesalers; wine or beer wholesalers may sell and ship only to wine or beer retailers; and wine or beer retailers may sell and ship only to customers. See *id.* §§ 4.1-207, -208, -302, -310. All wine or beer imports (except for limited direct shipments to customers) must go to wine or beer wholesalers. See *id.* §§ 4.1-207, -208, -112.1, -310. Narrow exceptions to the three-tier system that are not relevant here are outlined in section 4.1-215(B) of the Virginia Code.

[2] They also may transport three gallons of hard liquor purchased in-state. *Id.* § 4.1-311

tion"). Farm wine is made in Virginia on farms with active vineyards or from Virginia grapes. *Id.* § 4.1-100.

Under this regime, a resident of Roslyn, Virginia may purchase and bring home for personal use a case – or many cases – of wine or beer at any Virginia retailer. But that resident may *not* cross Key Bridge into the District of Columbia and purchase for personal use at home an equivalent amount of wine or beer. That is so even if making wine purchases in Georgetown would be more economical or convenient for the Roslyn resident than doing so at a Virginia retailer.

2. Petitioners are four Virginia consumers, two non-Virginia vineyards, and a non-Virginia retailer. In 2004, they challenged Virginia's personal import limit and its ABC stores restriction under the dormant Commerce Clause.[3] The district court invalidated both provisions. App., *infra*, 40a-98a.

The magistrate to whom the case was referred concluded that the personal import limit "cannot be viewed as serving any legitimate core concern of the Twenty-First Amendment unless, of course, one concludes that transportation of unlimited quantities of alcoholic beverages acquired within Virginia necessarily has less potential for intemperance or other

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[3] Before bringing this suit in 2004, the plaintiffs challenged five provisions of the Virginia Code, all of which the district court struck down. See *Bolick* v. *Roberts*, 199 F. Supp. 2d 397 (E.D. Va. 1999) (mem. op.); *id.* at add. (report and recommendation of magistrate judge filed July 7, 2001). After the Virginia legislature amended several of the provisions involved, the Fourth Circuit remanded. See *Bolick* v. *Danielson*, 330 F.3d 274 (2003). The plaintiffs amended their complaint accordingly, and the district court again struck down all five provisions. App., *infra*, 40a-98a. After the Court's decision in *Granholm*, the Virginia legislature repealed three of those provisions. See H.B. 610, 2006 Gen. Assem., Reg. Sess. (Va. 2006); App., *infra*, 9a. The two remaining provisions are the subject of this petition.

abuse than that acquired 'over the state line.'" *Id.* at 89a. The district court adopted the magistrate's recommendations, finding facial discrimination against interstate commerce in the differential treatment accorded out-of-state alcohol: "[A] plain reading of the statutes together demonstrate that * * * a consumer is limited in the amount of alcoholic beverages obtained out-of-state that he or she may transport into Virginia while a consumer * * * may acquire and transport an unlimited amount of alcohol within the state." *Id.* at 52a. The district court concluded that Virginia had articulated no purpose for this discrimination other than economic protectionism. Legitimate local purposes could include the Twenty-First Amendment's "core concerns of temperance, orderly market conditions, and collection of revenue" (*ibid.*); the Virginia scheme served none of them. See also *id.* at 53a ("The Magistrate Judge found that, other than economic protectionism, Virginia advanced no explanation that allows consumers to purchase and transport unlimited quantities of alcohol within the state, but limits that which they can purchase and import from out-of-state.").

The district court also struck down the ABC stores restriction, which allows ABC stores to sell Virginia but not out-of-state farm wine. Virginia did not deny that the ABC stores restriction discriminated against out-of-state wines, but instead justified the discrimination under the Commerce Clause "market participant exception." The court found, however, that Virginia is "both a regulator and a competitor which prevents the application of the market participant exception." *Bolick* v. *Roberts*, 199 F. Supp. 2d 397, 448 (E.D. Va. 2002); see App., *infra*, 56a. The court dismissed the State's argument that its roles as regulator and competitor could be separated. 199 F. Supp. 2d at 414 (citing *New Energy Co. of Ind.* v. *Limbach*, 486 U.S. 269, 277 (1988)).

3. A divided panel of the Fourth Circuit reversed with respect to both statutes. App., *infra*, 1a-39a. The majority, in part IIIC of its decision (*id.* at 21a-23a), held the personal

import limit constitutional under the Twenty-First Amendment as part of Virginia's "import regulation" scheme. Petitioners had argued that the personal import limit discriminates against interstate commerce because it both denies Virginians equal access to out-of-state alcoholic beverages sold at retail and disadvantages out-of-state retailers. See *id.* at 13a. The majority, however, regarded those effects as immaterial. Instead, the majority held that "the Personal Import [Limit] is justified as an appropriate regulation under the Twenty-first Amendment that is not denied legitimacy by being 'economic protectionism,' as was condemned by the holdings of *Granholm* and *Bacchus* [*Imports, Ltd.*, v. *Dias*, 468 U.S. 263 (1984)]." *Id.* at 21a. That is so, the majority reasoned, because it is "part of Virginia's import regulation," and the State's "interest in * * * regulating the importation, transportation, and use of wine in Virginia is protected by the Twenty-first Amendment." *Id.* at 22a-23a.

Writing only for himself in Part IIIB of the opinion (App., *infra*, 18a-21a), Judge Niemeyer also opined that the personal import limit is not actually discriminatory at all:

> Virginia's ABC Act authorizes the purchase of *unlimited* quantities of alcoholic beverages out-of-state, which then may be imported into the State *through the three-tier structure*. And it is only the purchases of unlimited amounts through the three-tier structure, not through the one-gallon/four-liter exception to the structure, that may be compared with the unlimited amounts that may be purchased in state from retailers.

*Id.* at 20a. In addition, Judge Niemeyer made the point that consumers may purchase as much wine or beer as they wish from out-of-state retailers, so long as they bring back no more than one gallon for consumption in Virginia. *Ibid.* Judge Traxler, the other member of the majority below, did not join these portions of Judge Niemeyer's opinion. See *id.* at 34a.

The majority also upheld the ABC stores restriction. App., *infra*, 23a-32a. It acknowledged that Virginia's decision to sell only locally produced wines in state-owned stores "discriminates against out-of-state wines" (*id.* at 23a), but held that the restriction fell within the market participant exception to the dormant Commerce Clause. As the majority saw it, the dormant Commerce Clause prohibits states from using "'exercises of governmental power (as opposed to the expenditure of state resources) to favor their own citizens.'" *Id.* at 24a (quoting *College Sav. Bank* v. *Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 685 (1999)). If a state participates in a market and uses its resources to favor local products, the majority went on, that favoritism escapes invalidation under the dormant Commerce Clause. The majority concluded by holding that the fact that Virginia both participates in *and* regulates the alcoholic beverages market "is not sufficient to preclude its status as a market participant." *Id.* at 29a. Although the majority acknowledged that this Court's precedents "stand for the proposition that a State may engage as a competitor in a free and open market," it dismissed petitioners' claim because "[t]here is no evidence that consumers face any impediment to purchasing wines of their preference at fair market prices." *Id.* at 30a.

Judge Goodwin disagreed with the majority's analysis on both counts. App., *infra*, 34a-39a. As to the personal import limit, he found that "[t]he law tilts the market in favor of in-state retailers by preventing Virginians from having meaningful access to the markets of other States." *Id.* at 35a-36a. Although he recognized that Virginia residents may purchase as much wine or beer out-of-state as they wish, "[i]n reality, * * * because Virginians may not carry more than a gallon of what they buy into Virginia, they are denied access to other States' markets on equal terms with other consumers. * * * Such access requires not only that a consumer be able to purchase a product, but also that the consumer be able to use it. By preventing importation into Virginia, the Personal Import

[Limit] impedes interstate commerce."[4] It thus "favors in-state economic interests over out-of-state interests." *Id.* at 36a.

Judge Goodwin also concluded that the personal import limit could not be saved on the theory that it is the only means of advancing a legitimate local purpose. Pointing to the district court's findings, he noted that the interests advanced by Virginia – facilitating tax collection and controlling bootleg liquor – "may be adequately served by reasonable nondiscriminatory alternatives." App., *infra*, 37a-38a.

Regarding the ABC stores restriction, Judge Goodwin reasoned that the relevant market was not wine alone, but rather alcoholic beverages more generally:

> A consumer's demand for purchasing both a bottle of liquor *and* a bottle of wine *at the same time* may be satisfied *only* in ABC Stores. The relevant market is not the market for wine, but the market for *wine and liquor*.

App., *infra*, 38a (emphasis in original). Because Virginia undoubtedly monopolized *that* market, Judge Goodwin concluded that "the market participant exception cannot justify the ABC Stores Restriction." *Ibid.*

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[4] Judge Goodwin offered this example: "Mr. Smith lives in Bristol, Virginia, a town on the Virginia/Tennessee border. He wants to purchase a 12-pack of beer. The closest place he can buy beer is just across West State Street in Tennessee. The closest store in Virginia is nearly twice as far from Mr. Smith's house. The Personal Import [Limit] deprives Mr. Smith of meaningful access to the conveniently located Tennessee retailer because it is located across the state line. To buy more than one gallon of beer (128 ounces), Mr. Smith must go to a Virginia store. Mr. Smith presumably could go to Tennessee and buy a 12-pack (approximately 144 ounces), but would have to either discard or drink two of the beers before crossing the street back into Virginia." App., *infra*, 36a.

## REASONS FOR GRANTING THE PETITION

Both aspects of the Fourth Circuit's holding frustrate important constitutional policies. Virginia's personal import limit is the sort of unequivocal discrimination against interstate commerce that this Court has long condemned: it stops the flow of goods at the state border, insulates local business from competition, and excludes state residents from the interstate market. The Twenty-First Amendment was never intended to validate a law of this kind. Its purpose was to let "dry" states stay dry, not permit "wet" states to create captive markets for in-state alcohol businesses. The Fourth Circuit's contrary conclusion guts the holding of *Granholm* and creates confusion in an important area of the law that *Granholm* sought to clarify.

The court of appeals' market-participant holding distorts the meaning of that doctrine, turning what had been a shield that allows states to compete in the market on even terms into a sword that they may use to obtain a competitive advantage. As described by this Court, the market-participant rule applies when a state enters the competitive arena with private actors. The Fourth Circuit, however, allowed Virginia to leverage an exercise of its *regulatory* authority into a regime that benefits local businesses at the expense of their out-of-state competitors. This holding, too, departs from principles announced by this Court and foments confusion on a recurring issue of considerable significance. The Court accordingly should grant review on both questions presented here.

## I. THE DECISION BELOW UPHOLDING THE PERSONAL IMPORT LIMIT IS INCONSISTENT WITH *GRANHOLM* AND MISSTATES CONSTITUTIONAL POLICY

### A. The Fourth Circuit Erred By Upholding A State Law That Works Facial Discrimination Against Interstate Commerce

#### *1. Under the Commerce Clause, facially discriminatory state laws are per se invalid*

At the outset, Virginia's personal use limit plainly discriminates against, and impedes the flow of, interstate commerce in a manner that ordinarily is unconstitutional. The Court has held repeatedly that one of the most important functions of the Commerce Clause is precluding states from "depriv[ing] citizens of their right to have access to the markets of other States on equal terms." *Granholm*, 544 U.S. at 473. "Our system, fostered by the Commerce Clause, is that * * * every consumer may look to the free competition from every producing area in the Nation to protect him from exploitation by any." *H.P. Hood & Sons, Inc.* v. *Du Mond*, 336 U.S. 525, 539 (1949). See, *e.g.*, *Philadelphia* v. *New Jersey*, 437 U.S. 617, 623 (1978) ("The opinions of the Court through the years have reflected an alertness to the evils of 'economic isolation' and protectionism."). Accordingly, state laws that discriminate facially against interstate commerce run afoul of "a virtually *per se* rule of invalidity." *Philadelphia*, 437 U.S. at 624.

The personal use limit is just such a law. The Virginia scheme permits Virginia residents to purchase from Virginia retailers, and take home for personal use, unlimited quantities of wine and beer. See Va. Code Ann. § 4.1-311(A)(1). If they purchase wine or beer from an out-of-state retailer, however, they may return with no more than one gallon. See *id.* §§ 4.1-310(E), -311(B). The Virginia scheme abruptly halts the flow of alcohol at the Virginia state line while leaving the flow of

alcohol within the State entirely untouched. The personal import limit is thus the quintessential discriminatory "law that overtly blocks the flow of interstate commerce at a State's borders." *Philadelphia*, 437 U.S. at 624. As such, it is "the clearest example" of discriminatory state legislation. *Ibid.*

In fact, the Virginia law works a double discrimination. First, it deprives Virginia residents of equal access to other states' markets in the plainest sense. To be sure, Virginians are not formally prohibited from *purchasing* more than a gallon of alcohol from out-of-state retailers. But the Commerce Clause is concerned with practical economic reality and "eschew[s] formalism" (*West Lynn Creamery, Inc.* v. *Healy*, 512 U.S. 186, 201 (1994)) and, as Judge Goodwin explained, "[i]n reality, * * * because Virginians may not carry more than a gallon of what they buy into Virginia, they are denied access to other States' markets on equal terms with other consumers." App., *infra*, 36a. The Virginia rule therefore is impermissible because it denies "access to the markets of other States on equal terms." *Granholm*, 544 U.S. at 473.

Second, the personal import limit starkly discriminates against out-of-state retailers. *Granholm* struck down state laws that "allow[ed] in-state wineries to sell wine directly to consumers * * * but [prohibited] out-of-state wineries from doing so, or, at the least, [made] direct sales impractical from an economic standpoint." *Granholm*, 544 U.S. at 466. Virginia's personal import limit does just the same thing. By giving Virginia consumers compelling incentives to purchase wine and beer only in-state, the law grants in-state retailers "a competitive advantage" over retailers "located beyond the States' borders." *Ibid.* Such a disparity constitutes "differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter" on its face. *Granholm*, 544 U.S. at 472 (citation omitted).[5]

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[5] Out-of-state retailers have no realistic way to access Virginia's market. Direct shipment from out-of-state retailers to Virginia con-

The majority below made no serious attempt to deny the discriminatory nature of the personal import limit. Its only effort in that regard was the suggestion that the provision "actually * * * disadvantage[s] local wineries whose wine may only be purchased through retailers." App., *infra*, 23a. But any such theoretical disadvantage to in-state wineries pales in comparison to the far greater benefits afforded local Virginia retailers. In any event, providing a benefit to interstate commerce in one area does not validate discrimination against interstate commerce in another. Cf. *Granholm*, 544 U.S. at 474 ("The suggestion of a limited exception for direct shipment from out-of-state wineries does nothing to eliminate the discriminatory nature of New York's regulations."). The majority below had nothing to say on this point.

*2. The Twenty-First Amendment does not authorize the personal import limit*

Despite this discrimination, the court below upheld the personal import limit, reasoning that the law is "part of Virginia's import regulation" and therefore "is protected by the Twenty-First Amendment." App., *infra*, 22a-23a. But this *ipse dixit* is insupportable. Applying the label "import regulation" does not wholly insulate a state alcohol regulation from Commerce Clause scrutiny. Precisely the same label was applied, with just as much justification, to the state laws invali-

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sumers is limited to two cases of wine and two cases of beer per customer per month, and even then the retailers must use ABC Board-approved common carriers and obtain written permission from the owner of each brand shipped. Va. Code Ann. § 4.1-112.1. Additionally, though out-of-state retailers may technically "import unlimited amounts of wine into the state through the three-tier structure" (App., *infra*, 20a), the retailers would be legally obligated to sell their products only to wholesalers, who would then resell to retailers. See Va. Code Ann. §§ 4.1-207, -208, -310(A). As in *Granholm*, "[t]hese two extra layers of overhead increase the cost of out-of-state" alcohol to in-state consumers. 544 U.S. at 474.

dated in *Granholm*. And while the Fourth Circuit majority declared that "under no economic construct could [the personal import limit] be considered economic protectionism of local industry" (*id.* at 23a), that simply is not so. As we have explained, Virginia law precludes effective competition by out-of-state retailers; just as in *Granholm*, "[t]he discriminatory character of the [state] system is obvious." 544 U.S. at 473. The decision below cannot be squared with *Granholm*'s analysis.

The Fourth Circuit's contrary conclusion was largely premised on its view that, under *Granholm*, "'it is unquestionably legitimate' for a State to bar the importation of alcoholic beverages or to 'funnel sales through the three-tier system.'" App., *infra*, 17a-18a (quoting *Granholm*, 544 U.S. at 489). But the suggestion that *any* limit on the transportation of alcohol across state lines is validated by the Twenty-First Amendment rests on a plain misreading both of *Granholm* and of the underlying constitutional policy. As Judge Goodwin noted below in dissent (*id.* at 37a), the majority omitted a crucial qualifier that appears in this Court's *Granholm* analysis: "A State *which chooses to ban the sale and consumption of alcohol altogether* could bar its importation." 544 U.S. at 488-489 (emphasis added). A ban on importation in such circumstances obviously does not discriminate because *no* purchase, transportation, or use in the state is lawful. But that principle provides no support to Virginia, which allows *unlimited* purchase, transportation, and use of alcohol – so long as it is acquired in-state.

In fact, the discrimination approved by the majority below cannot be squared with the purpose of the Twenty-First Amendment and its statutory predecessors. As recounted by the Court in *Granholm* (see 544 U.S. at 476-485), prior to 1890 the Commerce Clause was understood to leave states without the authority to regulate imported liquor "as long as it remained in its original package." *Granholm*, 544 U.S. at 478. Because this rule made it impossible for "dry" states to

preclude importation of alcoholic beverages, Congress enacted the Wilson Act, which empowered states to regulate imported alcohol "to the same extent and in the same manner" as domestic liquor. Wilson Act, ch. 728, 26 Stat. 313 (1890) (codified at 27 U.S.C. § 121). See *Granholm*, 544 U.S. at 478. And when the Court interpreted the Wilson Act as "authoriz[ing] States to regulate only the resale of imported liquor, not direct shipment to consumers for personal use" (*id.* at 480), Congress responded by "clos[ing] the direct shipment" loophole with the Webb-Kenyon Act, ch. 90, 37 Stat. 699 (1913) (codified at 27 U.S.C. § 122), which authorized states to regulate liquor imported for personal use. The Webb-Kenyon Act did *not*, however, authorize states to discriminate against out-of-state liquor; it required states to treat "in-state and out-of-state liquor on the same terms." *Granholm*, 544 U.S. at 481.[6] As the Court explained in *Granholm* (*id.* at 484), the Twenty-First Amendment adopted these standards as the constitutional rule.[7]

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[6] The Act's history makes that point clear. See 49 Cong. Rec. 4443 (1913) (statement of Rep. Stephens) (the Act gave "[e]ach State * * * the right to make its own laws on the subject of prohibition so long as there is no interference with interstate commerce"); 49 Cong. Rec. 2917 (1913) (statement of Sen. Stone) (Act would "merely put the shipper outside of Missouri or Iowa or Arkansas upon a level, that is upon terms of equality, so far as State law and regulation go, with the shipper within the State").

[7] The constitutional history establishes without a doubt that the overriding – and perhaps only – goal of the Amendment was to constitutionalize the Webb-Kenyon Act and thereby allow dry states to remain dry if they chose to do so. See, *e.g.*, 76 Cong. Rec. 4141 (1933) (statement of Sen. Blaine) ("to assure the so-called dry States against the importation of intoxicating liquor into those States, it is proposed to write permanently into the Constitution a prohibition along that line"); 76 Cong. Rec. 4171 (1933) (statement of Sen. Wagner) ("if the dry States want additional assurance

Of particular importance here, nothing in the Twenty-First Amendment gives states the authority to require that all alcoholic beverages consumed in the state be purchased in the state. To the contrary, the Amendment and its statutory predecessors were designed to allow dry states to stay dry; they were *not* intended to allow "wet" states to create captive alcohol markets that were insulated from interstate competition. Thus, the Webb-Kenyon Act "empowered States to forbid shipments of alcohol to consumers for personal use, *provided that the State treated in-state and out-of-state liquor on the same terms*." *Granholm*, 544 U.S. at 481 (emphasis added). The Act "was an attempt to eliminate the regulatory *advantage*, *i.e.*, its immunity characteristic," previously afforded to imported liquor. *Id.* at 482 (emphasis added). And Webb-Kenyon "readily can be construed as forbidding 'shipment or transportation' [of alcohol] only where it runs afoul of the State's generally applicable laws governing receipt, possession, sale, or use." *Ibid.*

The Amendment and its statutory predecessors accordingly allow *dry* states to protect their policy by precluding transportation of alcohol into the state – even transportation for personal use. Their intent "'was to take from intoxicating liquor the protection of the interstate commerce laws in so far

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that they will be protected I shall have no objection"); 76 Cong. Rec. 4171 (1933) (statement of Sen. Robinson) ("I do not wish to ask the Senate to put itself in the position of denying any measure of protection to dry territory."); 76 Cong. Rec. 4172 (1933) (statement of Sen. Borah) ("[T]he eighteenth amendment would never have been adopted had it not been for the open, brazen, corrupt, persistent defiance of the laws of the dry States by the liquor interests outside those States"; "All this was sought to be remedied by the Webb-Kenyon Act, and I am very glad indeed the able Senator from Arkansas has seen fit to recognize the justice and fairness to the States of incorporating it permanently in the Constitution of the United States.")

as necessary to deny them an advantage over the intoxicating liquors produced in the state into which they were brought.'" *Granholm*, 544 U.S. at 483 (citation omitted). And, in aid of enforcing state policy, the Amendment gives states control over *in-state* purchases and sales. But when a state *allows* consumption and purchases of unlimited amounts of alcohol from domestic sources, the Amendment does not allow the state to preclude the transportation of alcohol for personal use simply because it was acquired across state lines: the constitutional and statutory authority given the state "was 'intended to withdraw the protecting hand of interstate commerce from intoxicating liquors transported into a State or Territory *and intended to be used therein in violation of the law of such State or Territory.*'" *Granholm*, 544 U.S. at 508 (Thomas, J., dissenting) (quoting H.R. Rep. No. 1461, 62d Cong., 3 Sess. 1 (1913)) (emphasis added). But Virginia is not trying to stay dry or exclude alcohol whose use in the State is illegal; it is saving its alcohol market for its domestic retailers.

*3. The personal import limit does not serve any legitimate Twenty-First Amendment purposes*

Of course, even discriminatory state laws may be protected under the Twenty-first Amendment when they are the exclusive way to serve legitimate local purposes. See *Granholm*, 544 U.S. at 489. This Court has identified "promoting temperance, ensuring orderly market conditions, and raising revenue" as core state concerns that the Amendment protects. *North Dakota* v. *United States*, 495 U.S. 423, 432 (1990). But those interests are not served by the personal use limit. Although the majority below thought it "readily apparent that the Personal Import [Limit] is not economic protectionism but part of Virginia's import regulation" (App., *infra*, 22a-23a), it did not identify *any* legitimate interest served by the provision. That approach cannot be reconciled with *Granholm*, which in precisely this context insisted on "the 'clear-

est showing' to justify discriminatory state regulation." 544 U.S. at 490 (citation omitted).

The Fourth Circuit's failure to offer any justification for the personal use limit was an especially glaring omission because the district court found that the rule "cannot be viewed as serving any legitimate core concern of the Twenty-first Amendment unless, of course, one concludes that transportation of unlimited quantities of alcoholic beverages acquired within Virginia necessarily has less potential for intemperance or other abuse than that acquired 'over the state line.'" App., *infra*, 89a; see also *id.* at 53a ("The Magistrate Judge found that, other than economic protectionism, Virginia advanced no explanation that allows consumers to purchase and transport unlimited quantities of alcohol within the state, but limits that which they can purchase and import from out-of-state."). Judge Goodwin agreed in dissent, rejecting Virginia's claim that the import limit "facilitates tax collection and * * * controls the importation of bootleg liquor" because "[b]oth of these interests may be adequately served by reasonable nondiscriminatory alternatives." *Id.* at 37a.

That conclusion plainly was correct. In a system that permits unlimited purchases of wine and beer at local retailers (and unlimited home production for personal use), the personal import limit could hardly be thought to promote temperance or orderly market conditions. And if Virginia believes that limits on transportation of alcohol serve those purposes, it could achieve its goals as (indeed, more) effectively with a nondiscriminatory rule. Indeed, Virginia imposes such limits on the transportation of hard liquor purchased in-state (although even these limits are themselves set at discriminatory levels). See Va. Code §§ 4.1-311(A)(2), 4.1-311(B) (three gallons for in-state purchases, one gallon for out-of-state purchases). See also Mass. Gen. Laws ch. 138, § 22 (imposing transportation limits on out-of-state and in-state liquor alike).

Similarly, the personal import limit does not advance any legitimate state interest in the raising of revenue. For Twenty-First Amendment purposes, the maximizing of revenue is not an end in itself; it is a legitimate purpose only to the extent that it "serve[s] as an aid in policing the liquor traffic." *State Bd. of Equalization* v. *Young's Market*, 299 U.S. 59, 63 (1936). See also *Carter* v. *Virginia*, 321 U.S. 131 (1944). The court below did not offer, and there does not appear to be any, reason to believe that discrimination against alcohol purchased out-of-state will provide any help at all in furthering Virginia's substantive alcohol regulations.

*4. The alternative theory offered by the concurrence below cannot save the personal import limit*

Writing for himself, Judge Niemeyer offered an alternative defense of the personal use limit: he dismissed the argument that Virginians have unequal access to out-of-state markets because it was, in his view, premised on an impermissible comparison between import regulations and sales regulations. He reasoned that "an import regulation is quite distinct and different from a *sales* regulation, and comparing in-state sales with importation cannot give rise to a legitimate comparison for determining discrimination." App., *infra*, 20a (emphasis in original). The Virginia scheme does not actually forbid or limit purchases from out-of-state retailers, he opined, so long as Virginia residents carry no more than one gallon back into Virginia. The State, Judge Niemeyer concluded, thus "places no restriction on the amount of wine a person may purchase, either inside or outside Virginia." *Ibid.*

Judge Niemeyer also suggested that "an argument that compares the status of an in-state retailer with an out-of-state retailer—or that compares the status of any other in-state entity under the three-tier system with its out-of-state counterpart—is nothing different than an argument challenging the three-tier system itself." App., *infra*, 18a. Such a challenge

was foreclosed, Judge Niemeyer believed, by the Court's statement in *Granholm* that the three-tier system is "'unquestionably legitimate.'" *Ibid.*

This reasoning, however, offers no support for the personal use limit. *First*, it surely *is* legitimate to compare in-state and out-of-state *retailers*, just as the *Granholm* Court had no trouble comparing in-state and out-of-state *producers*. *Granholm* invalidated "differential treatment between in-state and out-of-state wineries" as "explicit discrimination against interstate commerce." 544 U.S. at 467. This Court's cases preclude any suggestion that comparing retailers is less legitimate than comparing producers: "For over 150 years, our cases have rightly concluded that the imposition of a differential burden on any part of the stream of commerce—from wholesaler to retailer to consumer—is invalid." *West Lynn Creamery, Inc.* v. *Healy*, 512 U.S. 168, 202 (1994) (collecting cases); *Camps Newfound/Owatonna, Inc.* v. *Town of Harrison*, 520 U.S. 564, 581 (1997).

*Second*, as Judge Goodwin noted in dissent, though "[i]n theory" Virginians are "free to purchase the same amounts as other customers" out-of-state, "[i]n reality" being unable to bring so little of their purchase home denies them "access to other States' markets on equal terms with other consumers. * * * [Meaningful access] requires not only that a consumer be able to purchase a product, but also that the consumer be able to use it." App., *infra*, 36a. Judge Niemeyer's highly technical argument thus ignores the reality—that state law erects a practical barrier to Virginians buying their alcohol out-of-state—in favor of a formal distinction between "sales" and "imports." In doing so, he deviated markedly from this Court's modern Commerce Clause jurisprudence, which has steadfastly "eschewed formalism" in favor of "a sensitive, case-by-case analysis of purposes and effects." *West Lynn Creamery*, 512 U.S. at 201; see also, *e.g.*, *Trinova Corp.* v. *Mich. Dep't of Treasury*, 498 U.S. 358, 373 (1991) ("We seek to avoid formalism.").

*Third*, Judge Niemeyer apparently assumed that *any* three-tier system is "unquestionably legitimate." Although Judge Niemeyer is correct that states may implement a three-tier licensing system in the exercise of their authority under the Twenty-First Amendment, that Amendment "did not give States the authority to pass nonuniform laws in order to discriminate against out-of-state goods." *Granholm*, 544 U.S. at 484-85. States therefore may not enact discriminatory laws and then immunize them from Commerce Clause review by making them part of a "three-tier system." Judge Niemeyer's argument was rejected in *Granholm*, where "[t]he States argue[d] that any decision invalidating their direct shipment laws would call into question the constitutionality of the three-tier system." *Id.* at 488. The Court emphasized that the Twenty-First Amendment protects only three-tier systems that "treat liquor produced out of state the same as its domestic equivalent." *Id.* at 489. States may have the authority to require separate licenses for producers, wholesalers, and retailers, but they may not use that authority – as does Virginia – to discriminate against interstate commerce.

### B. The Constitutionality Of Virginia's Import Limit Raises Issues Of General Importance.

The constitutionality of the personal use limit involves a question of substantial importance that warrants this Court's review. At least thirty-three other states and the District of Columbia have similar discriminatory provisions, relics of the era after the repeal of Prohibition.[8] The Court took the

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[8] Conn. Gen. Stat. § 12-436; Del. Code Ann. tit. 4, 716; Fla. Stat. ch. 562.15; Ga. Code Ann. § 3-3-8; Haw. Rev. Stat. § 281-33.1; Idaho Code § 23-610; 235 Ill. Comp. Stat. 5/1-3.16; Ind. Code § 7.1-5-11; Iowa Code § 123.22; Kan. Stat. Ann. § 41-501; Me. Rev. Stat. Ann. tit. 28-a, § 2076; Md. Code Ann. Tax-Gen., § 5-104; Mich. Comp. Laws § 436.1203(8)(a); Minn. Stat. § 297g.07; Mo. Rev. Stat. § 311.420; Mont. Code § 16-6-301; Neb. Rev. Stat. § 53-194.03; Nev. Rev. Stat. § 369.490; N.H. Rev. Stat. Ann. §

view at that time that the Twenty-First Amendment authorized discrimination against interstate commerce, and "unsurprisingly many States used the authority bestowed on them by the Court to expand trade barriers." *Granholm*, 544 U.S. at 485. This Court's "more recent cases" (*id.* at 486) changed that approach and struck down a number of protectionist alcohol regulations. See, e.g., *Healy* v. *The Beer Institute*, 491 U.S. 324 (1989); *Brown-Forman Distillers Corp.* v. *N.Y. State Liquor Authority*, 476 U.S. 573 (1986); *Bacchus Imports, Ltd.* v. *Dias*, 468 U.S. 263 (1984). The Court should grant review here to bring clarity to the application of a principle that is of such substantial national importance.

Immediate review is particularly important because states are now restructuring their laws in the wake of *Granholm*. Several states, for example, have modified their statutes dealing with interstate shipment of wine, as did Virginia itself. See, *e.g.*, Kevin McCallum, *Historic Ruling on Wine Shipments Loses Some of Its Luster: Some Wineries Enjoy Access to New Markets Afforded by Top Court, While Others Soured by Rules, Fees*, The Press Democrat, May 16, 2006; Wine Institute, *United States Shipping Laws for Direct Shipping of Wine: State Shipping Laws*, http://wi.shipcompliant.com/Home.aspx (last visited Feb. 7, 2007). Washington State opened its market to out-of-state wineries on June 7, 2006. S.B. No. 6537, 59th Leg., Reg. Sess., (Wash. 2006), 2006 Wash. Legis. Serv. 49 (West). Maine is considering a bill, introduced on January 16, 2007, to allow out-of-state wineries to ship wine and malt liquor directly to Maine residents.

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175:6; N.J. Stat. Ann. § 33:1-2; N.M. Stat. Ann. § 60-7A-3 (West); N.C. Gen. Stat. § 18B-402; N.D. Cent. Code § 5-01-16; Ohio Rev. Code § 4301.20; Okla. Stat. tit. 37, § 537; Or. Rev. Stat. § 471.405; 47 Penn. Cons. Stat. § 491(2); S.D. Codified Laws § 35-4-66; Tenn. Code §§ 57-3-401, 402; Tex. Alco. Bev. Code § 107.07; Vt. Stat. Ann. tit. 7, § 63; Wash. Rev. Code § 66.12.120; Wyo. Stat. Ann. § 12-3-101; D.C. Code § 25-7272

S. Paper No. 54, 123rd Leg., 1st Sess. (Me. 2007). Additional guidance from the Court now will be invaluable in keeping states from falling into (or failing to correct) constitutional error, and will prevent much future litigation.

Finally, and more generally, this Court has recognized its special role in policing state actions that disadvantage interstate commerce. Whether or not "the facts of this particular case, viewed in isolation, * * * appear to pose any threat to the health of the national economy,"

> history, including the history of commercial conflict that preceded the constitutional convention as well as the uniform course of Commerce Clause jurisprudence animated and enlightened by that early history, provides the context in which each individual controversy must be judged. The history of our Commerce Clause jurisprudence has shown that even the smallest scale discrimination can interfere with the project of our federal Union. As Justice Cardozo recognized, to countenance discrimination of the sort that [Virginia's] statute represents would invite significant inroads on our "national solidarity."

*Camps Newfound/Owatonna*, 520 U.S. at 595 (quoting *Baldwin* v. *G.A.F. Seelig, Inc.*, 294 U.S. 511, 523 (1935)). In light of this important principle, the Court has acknowledged its "'duty to determine whether the statute under attack, whatever its name may be, will in its practical operation work discrimination against interstate commerce.'" *West Lynn Creamery*, 512 U.S. at 201 (quoting *Best & Co.* v. *Maxwell*, 311 U.S. 454, 455-456 (1940)).

Here, the discriminatory impact is manifest. Because the decision below declined to remedy that discrimination, leaves the law in a state of considerable confusion, and addresses legal issues that are important and recurring, this Court should grant review.

## II. THE ABC STORES RESTRICTION IMPERMISSIBLY LEVERAGES THE STATE'S REGULATORY AUTHORITY INTO A COMPETITIVE ADVANTAGE FOR LOCAL BUSINESS.

### A. The Decision Below Misapplies This Court's Distinction Between "Market Regulators" And "Market Participants"

The Fourth Circuit's decision upholding the ABC stores restriction, another aspect of Virginia's discriminatory alcohol regime, also warrants review. Virginia law provides that only state-owned stores may sell liquor – and that those stores also may sell wine, but only wine produced in Virginia. The State thus has created a regulatory monopoly for itself in the sale of liquor and has leveraged that monopoly into a market advantage for Virginia wine producers. The decision upholding that concededly discriminatory statue under the market-participant exception to the Commerce Clause offers states an opportunity to engage in protectionist regulation, departs from principles announced by this Court, and adds confusion to an already murky area of the law.

1. The "market participant exception" allows a state to discriminate in favor of in-state interests when it is "acting as a market participant, rather than as a market regulator." *S.-Cent. Timber Dev., Inc.* v. *Wunnicke*, 467 U.S. 82, 93 (1984) (plurality opinion). The doctrine protects states' ability to favor in-state business when they act "in the more general capacity of a market participant" as opposed to their "distinctive governmental capacity" as a regulator. *New Energy Co.* v. *Limbach*, 486 U.S. 269, 277 (1988). Thus understood, the doctrine permits states "to operate freely in the free market." *Reeves, Inc.* v. *Stake*, 447 U.S. 429, 437 (1980); see also *Limbach*, 486 U.S. at 277 (noting that exception protects "state participation in the free market"). States are not protected, by contrast, when they pass "regulatory measures impeding free private trade." *Reeves*, 447 U.S. at 437; see also

*Hughes* v. *Alexandria Scrap Corp.*, 426 U.S. 794, 806 (1976) (prohibiting application of the exception when "the State [has] interfered with the natural functioning of the interstate market").

The Court has looked for "exercises of governmental power (as opposed to the expenditure of state resources)" to determine whether states are acting as regulators rather than market participants. *Coll. Sav. Bank* v. *Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 685 (1999); see also *Hughes*, 426 U.S. at 805 (upholding Maryland regulations that reduced "the flow of goods in interstate commerce" because the regulations affected the market by "bid[ding] up [the] price" but did not prevent private parties from participating in the market ); *Reeves*, 447 U.S. 437, 440, 444 (1980) (finding that "South Dakota, as a seller of cement, unquestionably fits the 'market participant' label" because it did not otherwise regulate the market). Thus, to invoke the market participant exception, a state must show that it is "burdened with the same restrictions imposed on private market participants." *Reeves*, 447 U.S. at 439. Courts of appeals have interpreted this requirement to mean that a state is not a market participant if it acts in ways not available to private parties. See, *e.g.*, *Nat'l Solid Wastes Mgmt. Ass'n* v. *Daviess County*, 434 F.3d 898, 903 (6th Cir. 2006) ("[A] local government is engaged in market regulation * * * if it exercises governmental powers that are unavailable to private parties."); *SSC Corp.* v. *Town of Smithtown*, 66 F.3d 502, 512 (2d Cir. 1995) ("A state's actions constitute 'market participation' only if a private party could have engaged in the same actions.").

2. It would seem obvious that, so far as the ABC stores restriction is concerned, Virginia is not a market participant in the relevant sense because it has not subjected itself to "the same restrictions imposed on private market participants." *Reeves*, 448 U.S. at 439. It has distorted the market by creating a regime in which consumers who want to purchase all of their alcoholic beverages at one time or in one place *must*

purchase Virginia wine. There can be no denying this market distortion. Consider the example of a private Virginia hardware store. It might like to increase the sales of Acme hammers by requiring that all residents of the state who want to purchase their hammers and nails at once may buy only Acme hammers. But that sort of mandate is, of course, beyond the power of any private business to impose; if a private store imposes such a requirement on its customers, consumers of nails who prefer Apex hammers will simply take their business across the street. That sort of mandate, however, is just what Virginia accomplished in the ABC stores restriction when it effectively provided that Virginia residents who want to buy liquor and wine at the same time *must* purchase Virginia farm wine.

Moreover, the benefit conferred on Virginia wines by this regime is manifest. As Judge Goodwin noted, "[a] consumer's demand for purchasing a bottle of liquor *and* a bottle of wine *at the same time* may be satisfied *only* in ABC Stores." App., *infra*, 38a (emphasis in original). It necessarily is the case that a market structured in this way will increase sales of Virginia farm wine at the expense of competing out-of-state products. Consider our hardware store; no one can doubt that, if only one store in town were permitted to sell nails, it also would experience increased sales of screws, measuring tapes, and ladders as customers opted to buy related items simultaneously. Or consider the competitive pricing strategy of the "loss leader," in which discounts on one item lure consumers to a store where they also buy other items.[9] Virginia leverages its hard liquor monopoly in much the same way. But Virginia does not use a competitive pric-

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[9] For an overview of the "loss leader" concept and its effectiveness as a marketing tool, see Rockney G. Walters & Scott B. MacKenzie, *A Structural Equations Analysis of the Impact of Price Promotions on Store Performance*, 25 J. MARKETING RES. 51 (1988).

ing strategy to draw customers to the ABC stores; instead, it uses its regulatory power to achieve the same advantage.

This sort of departure from ordinary market behavior on the part of the State cannot be reconciled with the rationale for the market-participant doctrine. The Court made just that point in *Wunnicke*, the leading decision on limits to the doctrine, where it invalidated a state requirement that timber taken from state lands be processed within the state prior to export. The controlling opinion made clear that the market-participant doctrine does not apply when the state gives itself an advantage unavailable to private participants in the market. The Court explained that ordinarily a purchaser of timber "retains the option" of deciding where to process the product, but in *Wunnicke* "the choice is made for him." 467 U.S. at 95 (plurality opinion). It noted that, "[i]n the commercial context, the seller usually has no say over, and no interest in, how the product is to be used after sale." *Id.* at 96. And it emphasized that the state was "using its leverage in [one] market to exert a regulatory effect in [another] market." *Id.* at 98. Although the factual setting of this case is different, the governing principle is similar: Virginia is "leveraging" its monopoly power over liquor to affect the market for Virginia wine.

As a market regulator, and consistent with its powers under the Twenty-first Amendment, Virginia may exercise a monopoly over the sale of liquor in the State. As a market participant, it may choose to advantage Virginia farm wine at state-owned stores, provided that the market in which it operates is free. But it may not regulate to give itself a competitive advantage and then use that advantage to discriminate against interstate commerce. Such an interpretation would run counter to the "free market" principle that lies at the heart of the market participant exception and to the purpose of the Commerce Clause itself. See *White* v. *Mass. Council of Constr. Employers*, 460 U.S. 204, 218 (1983) (line between market participant and regulator should be drawn "with ref-

erence to the constitutional values giving rise to the market participant exemption itself.")

3. In holding to the contrary, the majority below did not actually deny that the combination of Virginia's liquor monopoly and the ABC stores restriction in fact increases sales of Virginia farm wine at the expense of out-of-state competitors.[10] Instead, the heart of its reasoning was its belief that "[t]hese are matters of convenience, not monopoly power." App., *infra*, 31a. But it is immaterial that consumers are not wholly deprived of choice if the state uses its regulatory authority to give itself an advantage in the market. The decisive point is that Virginia denies competitors a valuable market opportunity (offering both liquor and wine) that it monopolizes for itself. A retailer ordinarily "retains the option" of deciding which products to offer so as to obtain the best return, but in Virginia "the choice is made for him." *Wunnicke*, 467 U.S. at 95 (plurality opinion).[11]

The majority also went astray in its answer to Judge Goodwin's dissent. The majority complained that "there is no evidence in the record to support the dissent's single market theory in an economic sense," that "[t]he dissent cannot legitimately argue that * * * consumers demanding a bottle of whiskey or vodka will fulfill that demand by buying a bottle of wine," and that "[c]ommon sense compels the conclusion that there simply is no cross-elasticity of demand to justify

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[10] The majority did state that there is no evidence "[t]hat consumers face any impediment to purchasing wines of their preference at fair prices" (App., *infra*, 30a), but that is quite a different point; it says nothing about the positive competitive advantage conferred on Virginia farm wines.

[11] It also would be beside the point, even if true, that the impact on the market of the ABC stores restriction was not dramatic; the Court has "never recognized a 'de minimis' defense" to a facially discriminatory state law." *Fulton Corp.* v. *Faulkner*, 516 U.S. 325 333 & n.3 (1996).

concluding that there is a single market consisting of wine and liquor." App., *infra*, 31a. Even if this is so, however, it wholly misses the point. Whether or not they are substitutes for one another, wine, beer, and liquor surely are complements; many consumers purchase more than one type of alcoholic beverage and would prefer to do so at one time and in one place.[12] Judge Goodwin correctly noted that Virginia pushes all of those people to its ABC stores, where they may purchase only Virginia farm wines. The majority fails to respond at all to that point.

### B. The Constitutionality Of Virginia's Discrimination Against Out-Of-State Wineries Raises Issues Of General Importance

The significant nature of the ruling below itself warrants review of the ABC stores holding. And the need for consideration by this Court is especially acute because the market-participant doctrine is one that is characterized by confusion and uncertainty. Indeed, *Wunnicke*, the Court's leading decision on the doctrine's limits, was itself a plurality opinion that recognized the "precise contours of the market-participant doctrine have yet to be established." 467 U.S. at 93 (plurality opinion).

It therefore is not surprising that the distinction between market participant and market regulator "is a fuzzy one that has perplexed courts and commentators alike." *Big Country Foods, Inc.* v. *Board of Educ. of Anchorage School Dist.*, 952 F.2d 1173, 1178 (9th Cir. 1992). See, *e.g.*, *Swin Resource Systems, Inc.* v. *Lycoming County*, 883 F.2d 245, 249 (3d Cir.

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[12] See generally Paul Samuelson, *Complementarity: An Essay on the 40th Anniversary of the Hicks-Allen Revolution in Demand Theory*, 12 J. Econ. Literature 1255, 1261 (1974)); Leff Smith, *For Some in the Area, That's A Real Holiday*, Washington Post, Jan. 1, 2007, at B1 (describing how D.C. metro residents—including Virginia suburbanites—travel to the District of Columbia to buy champagne and hard liquor for New Year's Eve parties).

1989) ("Application of the distinction between 'market participant' and 'market regulator' has, however, occasioned considerable dispute in the Supreme Court's jurisprudence."); *Shell Oil Co.* v. *Santa Monica*, 830 F.2d 1052, 1056 (9th Cir. 1987) ("[T]he key distinction between 'market regulator' and 'market participant' * * * though clearly defined in theory, has occasioned considerable dispute in application.") (internal citations omitted); 1 Laurence H. Tribe, *American Constitutional Law* 1091 (3d ed. 2000) ("Indeed, the line between market participation and market regulation, which was less than pellucid even in *Alexandria Scrap*, has if anything been further obscured since."); Barton B. Clark, *Give 'Em Enough Rope: States, Subdivisions and the Market Participant Exception to the Dormant Commerce Clause*, 60 U. Chi. L. Rev. 615, 616 (1993) ("Current doctrine offers little direction to courts that must apply the exception. The Supreme Court has not yet identified criteria which reliably identify when states are acting as market participants.") Karl Manheim, *New-Age Federalism and the Market Participant Doctrine*, 22 Ariz. St. L.J. 559 (1990); Dan T. Coenen, *Untangling the Market-Participant Exemption to the Dormant Commerce Clause*, 88 Mich.L.Rev. 395 (1989).[13]

This Court itself has in the past been unable to resolve market-participant questions. In *Western Oil & Gas Ass'n* v. *Cory*, 726 F.2d 1340, 1341 (9th Cir. 1984), *aff'd by an equally divided court*, 471 U.S. 81 (1985), an equally divided Court affirmed a decision by the Ninth Circuit invalidating a

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[13] Imprecision in the doctrine has led to conflicting outcomes on identical facts. Compare, *e.g.*, *W.C.M. Window Co., Inc.* v. *Bernardi*, 730 F.2d 486, 496 (7th Cir. 1984) (striking down state law requiring contractors on any public works project to hire only state laborers), with *Trojan Technologies, Inc.* v. *Pennsylvania*, 916 F.2d 903, 912 (3d Cir. 1990) (upholding similar state law); *Big Country Foods, Inc. v Board of Education of Anchorage School District*, 952 F.2d 1173, 1179 (9th Cir. 1992) (same).

state law that had some similarity to the one at issue here. In that case, California discriminated against interstate and foreign commerce in the rent it charged for pipelines that traversed state land. As here, the State tried to justify the discrimination as market activity, "maintain[ing] that [California] is merely one of many participants in the market competing for leases." *Id.* at 1342. But in contrast to the Fourth Circuit in this case, the Ninth Circuit rejected the State's argument, reasoning that, because California owned the land "in its sovereign capacity" and had "a complete monopoly over the sites," it exercised "control over the channels of interstate commerce." *Ibid.* This Court granted certiorari to address the market-participant issue, but instead divided evenly. A grant of review here would allow the Court to provide the guidance precluded by its division in *Western Oil & Gas Ass'n.*

In addition, although the importance of resolving confusion about the market participant doctrine transcends the Twenty-First Amendment context, review in this case would bring much-needed clarity in that area as well. Many states have state-run liquor stores. See, *e.g.*, Ala. Admin. Code r.20-X-4-.01; N.H. Rev. Stat. Ann. § 177:1; Utah Code Ann. § 32A-2-101; Wyo. Code Ann. § 12-2-301. As states seek to bring their laws in line with the Constitution after *Granholm*, guidance by this Court is essential.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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FEBRUARY 2007

# APPENDIX

**APPENDIX A**

PUBLISHED

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

PETER BROOKS; DAVID T. GIES; PATRICIA CLEMMER PETERS; ROBIN B. HEATWOLE; DRY COMAL CREEK VINEYARDS, a Texas Corporation; HOOD RIVER VINEYARDS, an Oregon Sole Proprietorship; SCHNEIDER LIQUOR COMPANY, INCORPORATED,

Plaintiffs Appellees,

and

MIURA VINEYARDS, a California Limited Liability Company; CLINT BOLICK,

Plaintiffs,

v.

ESTHER H. VASSAR, Chairman, Virginia Department of Alcoholic Beverage Control; PAMELA O'BERRY EVANS, Commissioner, Virginia Department of Alcoholic Beverage Control; SUSAN R. SWECKER, Commissioner, Virginia Department of Alcoholic Beverage Control,

Defendants-Appellants, and

VIRGINIA WINE WHOLESALERS ASSOCIATION, INCORPORATED,

Intervenor-Defendant.

VIRGINIA VINEYARDS ASSOCIATION,

Movant.

No. 05-1540

PETER BROOKS; DAVID T. GIES;
PATRICIA CLEMMER PETERS; ROBIN B. HEATWOLE;
DRY COMAL CREEK
VINEYARDS, a Texas Corporation; HOOD RIVER VINEYARDS, an Oregon Sole Proprietorship; SCHNEIDER
LIQUOR COMPANY, INCORPORATED,

Plaintiffs-Appellees, and

MIURA VINEYARDS, a California Limited Liability
Company; CLINT BOLICK,

Plaintiffs,

v.

ESTHER H. VASSAR, Chairman,
Virginia Department of Alcoholic Beverage Control; PAMELA O'BERRY EVANS, Commissioner, Virginia Department of Alcoholic Beverage
Control; SUSAN R. SWECKER,
Commissioner, Virginia Department of Alcoholic Beverage
Control,
Defendants,

and

VIRGINIA WINE WHOLESALERS ASSOCIATION, INCORPORATED,

Intervenor-Defendant-Appellant.

VIRGINIA VINEYARDS ASSOCIATION,

Movant.

No. 05-1541

PETER BROOKS; DAVID T. GIES;
PATRICIA CLEMMER PETERS; ROBIN B. HEATWOLE;
DRY COMAL CREEK
VINEYARDS, a Texas Corporation; HOOD RIVER
VINEYARDS, an Oregon Sole Proprietorship; SCHNEIDER
LIQUOR COMPANY, INCORPORATED,

Plaintiffs-Appellants,

and

MIURA VINEYARDS, a California Limited Liability
Company; CLINT BOLICK,

Plaintiffs,

v.

ESTHER H. VASSAR, Chairman,
Virginia Department of Alcoholic
Beverage Control; PAMELA O'BERRY EVANS,
Commissioner, Virginia Department of Alcoholic Beverage
Control; SUSAN R. SWECKER,
Commissioner, Virginia Department of Alcoholic Beverage
Control,
Defendants-Appellees,

and

VIRGINIA WINE WHOLESALERS ASSOCIATION,
INCORPORATED,

Intervenor-Defendant.

VIRGINIA VINEYARDS ASSOCIATION,

Movant.

No. 05-1791

Appeals from the United States District Court for the Eastern District of Virginia, at Richmond.
Richard L. Williams, Senior District Judge;
Dennis W. Dohnal, Magistrate Judge.
(CA-99-755-RLW)

Argued: May 26, 2006

Decided: September 11, 2006

Before NIEMEYER and TRAXLER, Circuit Judges, and Joseph R. GOODWIN, United States District Judge for the Southern District of West Virginia, sitting by designation.

Affirmed in part; reversed in part; and dismissed in part, vacated and remanded by published opinion. Judge Niemeyer wrote the opinion, in which Judge Traxler concurred except as to Part III.B and Judge Goodwin concurred except as to Parts III and IV. Judge Traxler wrote an opinion concurring in part and concurring in the judgment. Judge Goodwin wrote an opinion concurring in Parts I, II, and V and dissenting from Parts Ill and IV.

**OPINION**

NIEMEYER, Circuit Judge:

This appeal involves a facial challenge, under the dormant Commerce Clause of the United States Constitution, to various aspects of Virginia's Alcoholic Beverage Control Act ("ABC Act"), Va. Code § 4.1-100 *et seq.*, which generally prohibits the importation, distribution, and sale of wine and beer in Virginia except through a regulated, three-tier structure. We sustain the constitutionality of:

(1) Virginia Code § 4.1-310(E), which provides an exception to the three-tier import restriction for consumers who personally carry into Virginia no more than one gallon (or four liters) of alcoholic beverages for personal consumption; and

(2) Virginia Code § 4.1-119(A), which authorizes state-owned and -operated ABC stores to market and sell only wine produced at Virginia "farm" wineries.

Accordingly, with respect to these two aspects of the ABC Act, we reverse the judgment of the district court, which concluded that these provisions unconstitutionally discriminated against interstate commerce.

With respect to challenged provisions of the ABC Act that permit in-state producers of wine and beer, but not out-of-state producers, to bypass the three-tier structure and sell directly to in-state retailers and consumers — Virginia Code §§ 4.1-112.1(B); 4.1-207(4),(5); 4.1-208(1),(7) — we conclude that Virginia legislative amendments enacted while this appeal was pending render the challenge to those provisions moot and therefore bar us from considering the district court's order and the amended provisions. Accordingly, with respect to them, we dismiss the appeals, vacate the district court's judgment, and remand for dismissal of the claims challenging those provisions.

Finally, with respect to the district court's conclusion that the plaintiffs in this case are entitled to maintain their action under 42 U.S.C. § 1983 and therefore qualify for an award of attorneys fees if they are the prevailing party, as provided by 42 U.S.C. § 1988, we affirm.

## I

Through its ABC Act, which was enacted following the ratification of the Twenty-first Amendment and the end of Prohibition, Virginia regulates the distribution and sale of alcoholic beverages under a three-tier structure. Under this structure, producers and sellers of alcoholic beverages may sell in Virginia only to Virginia-licensed wholesalers, who in turn may sell only to Virginia-licensed retailers, who may then sell to consumers.

In November 1999, Clint Bolick and Robin Heatwole, individual consumers of wine and beer, and Dry Comal Creek Winery, Miura Vineyards, and Hood River Vineyard, wineries based in Texas, California, and Oregon, respectively, commenced this action under 42 U.S.C. § 1983 against the members of Virginia's Alcoholic Beverage Control Board, alleging that Virginia's ABC Act violated the dormant Commerce Clause of the United States Constitution by favoring in-state wine and beer producers and discriminating against out-of-state producers. The district court granted summary judgment to the plaintiffs, sustaining the plaintiffs' challenges and enjoining the enforcement of the relevant portions of the ABC Act. *See Bolick v. Roberts*, 199 F. Supp. 2d 397, 416-17 (E.D. Va. 2002) ("*Bolick I*"). Virginia appealed that decision to this court.

While the appeal of *Bolick I* was pending, the Virginia General Assembly enacted H.B. 1652 and S.B. 1117, which modified some of the contested statutory provisions. Virginia claimed on appeal that the legislative changes mooted portions of the case and altered the arguments and analysis necessary to adjudicate the remaining issues. We agreed. In *Bolick v. Danielson*, 330 F.3d 274 (4th Cir. 2003) ("*Bolick II*"), we vacated the district court's order and remanded the case for reconsideration in light of our intervening opinion in *Beskind v. Easley*, 325 F.3d 506 (4th Cir. 2003), which addressed a similar challenge to North Carolina's ABC laws.

On remand, the plaintiffs filed a second amended complaint that substituted new plaintiffs and modified the plaintiffs' claims to take into account the revisions enacted by the Virginia General Assembly. The original "winery plaintiffs," Dry Comal Creek Winery and Hood River Vineyards, were joined by Peter Brooks, David T. Gies, and Patricia Clemmer Peters, consumers of wine and beer, and by Schneider Liquor Company, a wine and beer retailer incorporated and licensed in the District of Columbia. In their second amended complaint, the plaintiffs identify five aspects of Virginia's ABC

Act, as amended, that they allege unconstitutionally discriminate against out-of-state producers and sellers of alcoholic beverages:

> The *first* is the "Distribution Privilege" of in-state wineries and breweries by which in-state wineries and breweries, but not out-of-state wineries and breweries, are allowed to bypass the wholesale level and sell and deliver unlimited amounts of wine and beer directly to in-state retailers. *See* Va. Code §§ 4.1-207(4),(5); 4.1-208(1),(7).
>
> The *second* is a "Delivery Privilege" conferred on in-state producers to deliver unlimited amounts of wine and beer directly to consumers provided the producers use their own mode of transportation to perform deliveries, while limiting out-of-state producers and sellers to two cases per month using common carriers. *See id.* §§ 4.1-207(4),(5); 4.1-208(1),(7).
>
> The *third* is a "Shipping Privilege" which favors in-state retailers. All retailers are required to obtain licenses to sell and ship directly to Virginia consumers, but out-of-state retailers are also required to obtain written permission from the producer of each type of wine or beer that the retailer planned to ship into Virginia. *See id.* § 4.1-112.1(B).
>
> The *fourth* is a "Personal Import Exception" that allows individual consumers to import into Virginia one gallon or four liters (if packaged in metric containers) of wine and beer without requiring the wine and the beer to be sold through the three-tier system. *See id.* § 4.1-310(E).
>
> And the *fifth* is an "ABC Stores Restriction," limiting state-owned and -operated ABC stores to mar-

keting and selling only wine produced by Virginia "farm" wineries. *See id.* § 4.1-119(A).

On the parties' cross-motions for summary judgment, the district court held that the challenged portions of the ABC Act unconstitutionally discriminated against out-of-state wine and beer producers and sellers and that those portions were not saved by the Twenty-first Amendment. In its judgment, dated April 27, 2005, the court declared unconstitutional and enjoined the enforcement of Virginia Code §§ 4.1-112.1(B); 4.1-207(4),(5); 4.1-208(1),(7); 4.1-310(E); and 4.1-119(A).

Thereafter, the plaintiffs filed a motion to amend or clarify the district court's judgment, and Virginia filed a motion for a stay of the judgment pending appeal. Before the district court had resolved these motions, the Supreme Court issued its opinion in *Granholm v. Heald*, 544 U.S. 460 (2005), which directly addressed the relationship between the dormant Commerce Clause and the Twenty-first Amendment in the context of laws similar to the ABC Act at issue here. In a Memorandum Opinion dated June 16, 2005, the district court in this case recognized the Supreme Court's intervening decision and held that because "*Granholm* resolved the central question of this case consistent with the Fourth Circuit's interpretation [in *Beskind*] of the tension between the Commerce Clause and the Twenty-First Amendment, the Court is unpersuaded that it should stay the operation of its [April 27, 2005] order." The district court denied the plaintiffs' motion to amend or clarify the judgment and Virginia's motion for a stay.

From the district court's judgment, Virginia filed this appeal, challenging the district court's ruling only insofar as it struck down the Personal Import Exception (§ 4.1-310(E)) and the ABC Stores Restriction (§ 4.1-119(A)). Virginia conceded that the Distribution, Delivery, and Shipping Privileges were unconstitutional under *Granholm*, and it initially

indicated an intent to ask the Supreme Court to overrule its decision and uphold those provisions. But it has abandoned that course by reason of subsequent legislative action by the Virginia General Assembly. In its appeal, Virginia also contends that the district court erred in construing the plaintiffs' action as arising under 42 U.S.C. § 1983.

The plaintiffs filed a cross-appeal, challenging the district court's remedy of striking down the Distribution, Delivery, and Shipping Privileges for in-state producers of wine and beer. The plaintiffs contend that the appropriate remedy is to enjoin the ABC Act's prohibition against direct shipments to Virginia retailers and consumers by out-of-state wine and beer producers rather than striking down the privileges given to in-state producers and retailers.

While these appeals were pending, the Virginia General Assembly passed H.B. 601, which essentially codified the district court's judgment concerning the Distribution, Delivery, and Shipping Privileges, effective July 1, 2006. After enactment of this legislation, Virginia filed a motion to vacate the district court's judgment in part and to dismiss the plaintiffs' cross-appeal, claiming that the General Assembly's changes rendered moot the plaintiffs' challenges to the Distribution, Delivery, and Shipping Privileges and to the district court's remedy. The plaintiffs agree and state that Virginia's appeal with respect to the Distribution, Delivery, and Shipping Privileges should also be dismissed as moot.

Accordingly, we are now presented with the following issues: (1) whether Virginia's recent legislation moots Virginia's appeal concerning the Distribution, Delivery, and Shipping Privileges and the plaintiffs' cross-appeal concerning the imposed remedy; (2) whether the Personal Import Exception violates the dormant Commerce Clause interpreted in light of the Twenty-first Amendment; (3) whether the ABC Stores Restriction violates the dormant Commerce Clause interpreted in light of the Twenty-first Amendment;

and (4) whether the plaintiffs' dormant Commerce Clause claims arise under 42 U.S.C. § 1983.

## II

The district court's April 27, 2005 judgment held in part that some particular provisions of the ABC Act, which afford local wineries Distribution, Delivery, and Shipping Privileges — all of § 4.1-112.1(B) of the Virginia Code and portions of §§ 4.1-207(4), 4.1-207(5), 4.1-208(1), and 4.1-208(7) — constituted an unconstitutional discrimination against out-of-state producers and sellers of wine and beer. By statutory modification, effective July 1, 2006, Virginia virtually codified the portions of the district court's decision relating to these privileges. The General Assembly's amendments track almost completely the district court's order. Although the amendment to § 4.1-112.1(B) strikes only one sentence in the statutory provision and therefore does not literally implement the court's order, the General Assembly's change substantially effectuates the order by striking only the constitutionally offending sentence.

The parties agree that these recent amendments fully implemented the district court's judgment enjoining enforcement of portions of the relevant statutes. Furthermore, the plaintiffs have all but conceded that there is no practical likelihood that Virginia will repeal these amendments and restore the enjoined provisions. Accordingly, Virginia requests that the portions of the district court's judgment that deal with the Distribution, Delivery, and Shipping Privileges be vacated as moot.

The doctrine of mootness constitutes a part of the constitutional limits of federal court jurisdiction. "To qualify as a case fit for federal-court adjudication, an actual controversy must be extant at all stages of review, not merely at the time the complaint is filed." *Arizonans for Official English v. Arizona*, 520 U.S. 43, 67 (1997) (internal quotation marks omitted). Federal courts have no power to hear moot cases, and

because a case can become moot at any time — even after the entry of a final judgment — the doctrine prevents a federal court of appeals from exercising its appellate jurisdiction in a moot case. *See Mellen v. Bunting*, 327 F.3d 355, 363-64 (4th Cir. 2003). A case is not moot, and the exercise of federal jurisdiction may be appropriate, however, if a party can demonstrate that the apparent absence of a live dispute is merely a temporary abeyance of a harm that is "capable of repetition, yet evading review." *See id.* at 364.

When a legislature amends or repeals a statute, a case challenging the prior law can become moot "even where reenactment of the statute at issue is within the power of the legislature." *Am. Legion Post 7 of Durham, N.C. v. City of Durham*, 239 F.3d 601, 606 (4th Cir. 2001). Only if reenactment is not merely possible but appears probable may we find the harm to be "capable of repetition, yet evading review" and hold that the case is not moot. *Id.*; *see also Reyes v. City of Lynchburg*, 300 F.3d 449, 453 (4th Cir. 2002) (mooting an appeal when there was "no reasonable expectation that Lynchburg [would] reenact the ordinance" (citing *Arizonans for Official English*, 520 U.S. at 67)).

In the case before us, the parties agree that, consistent with the district court's order, Virginia's recent amendments "essentially moot three of the claims Plaintiffs won below" because the amendments changed the operation of the Distribution, Delivery, and Shipping Privileges so as to effectuate the district court's judgment. Furthermore, because the plaintiffs have all but agreed that there is no practical likelihood Virginia will reenact these privileges, we agree with the parties that challenges to these privileges are moot and that we have no jurisdiction to determine whether the amendments are constitutional or whether the district court's judgment was correct. Accordingly, we dismiss Virginia's appeal insofar as it pertains to the plaintiffs' challenges to the Distribution, Delivery, and Shipping Privileges and the entirety of the plaintiffs' cross-appeal.

When we dismiss an appeal as moot, we generally also vacate the district court's judgment and order the district court to dismiss the moot portions of the case. *See United States v. Munsingwear, Inc.*, 340 U.S. 36, 39 (1950); *Mellen*, 327 F.3d at 364. Although the Constitution compels dismissal of a moot case, vacatur on appeal is an equitable rule "warranted only where mootness has occurred through happenstance, rather than through voluntary action of the losing party." *Mellen*, 327 F.3d at 364; *see also U.S. Bancorp Mortgage Co. v. Bonner Mall P'ship*, 513 U.S. 18, 25 (1994). Inasmuch as we have held that a State legislature's amendment of a challenged law is not "voluntary cessation" attributable to the State's executive officials defending a challenge to that law, *see Valero Terrestrial Corp. v. Paige*, 211 F.3d 112, 116 (4th Cir. 2000), we decline the plaintiffs' request that we remand to have the district court determine "whether mootness was directly and deliberately caused by Defendants."

The portions of the district court's judgment holding that the Distribution, Delivery, and Shipping Privileges are unconstitutional and the portions of its final injunction barring their enforcement are vacated, and we remand this case to the district court to dismiss the relevant claims.

## III

We now consider whether Virginia Code § 4.1-310(E)(i), the Personal Import Exception to the three-tier system, violates the dormant Commerce Clause.

Virginia Code § 4.1-310 prohibits generally the importation of alcoholic beverages into Virginia except through the three-tier structure. That provision, however, makes some exceptions for, by way of example, industrial, manufacturing, and medical purposes, see Virginia Code § 4.1-310(A)(i)-(iii), and for boats, railcars, and common carriers engaged in interstate commerce, *see id.* § 4.1-310(E)(iii). It also makes an exception for a small amount (one gallon or four liters) of alcoholic beverages for personal consumption — the Per-

sonal Import Exception — *see id.* § 4.1-310(E)(i).[1] Only through exceptions such as these may a person or entity import alcoholic beverages out-side of the three-tier structure.

The plaintiffs contend that the Personal Import Exception discriminates against interstate commerce because it

> limits the amount of wine and beer Virginia consumers can personally transport into the State for their personal consumption, thus "causing local goods to constitute a larger share, and goods with an out-of-state source to constitute a smaller share of, the total sales in the market. . . . At the same time, Virginia imposes no restriction on how much wine or beer residents can purchase from in-state retailers, wineries, or breweries and personally transport *within the Commonwealth*. . . . This difference in treatment constitutes facial and effectual discrimination in violation of the dormant Commerce Clause that cannot be "saved" by the Twenty-First Amendment.

Plaintiffs advanced this argument in their brief before the Virginia legislature's recently enacted amendments rendered moot the plaintiffs' challenges to the Distribution, Delivery, and Shipping Privileges in the ABC Act. And their challenge to the Personal Import Exception depended in part on the discrimination created by Virginia's allowing consumers to buy unlimited amounts of wine directly from Virginia wineries

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[1] Section 4.1-310(E) of the Virginia Code provides in relevant part:

> The provisions of this chapter shall not prohibit (i) any person from bringing, in his personal possession, or through United States Customs in his accompanying baggage, into the Commonwealth not for resale, alcoholic beverages in an amount not to exceed one gallon or four liters if any part of the alcoholic beverages being transported is held in metric-sized containers.

(bypassing the three-tier structure) but only one gallon or four liters of wine from out-of-state wineries. Because Virginia wineries can no longer sell directly to consumers, this argument has also become moot. Indeed, with the amendments now in place, out-of-state wineries may be favored over in-state wineries in that consumers can purchase one gallon or four liters of wine directly from out-of-state wineries and import the wine into Virginia without going through the three-tier system, but they cannot buy wine directly from in-state wineries.[2]

Plaintiffs' challenge to the Personal Import Exception also included the argument that it discriminates against interstate commerce because consumers can purchase unlimited amounts of wine from Virginia retailers but may import only a gallon or four liters of wine from out-of-state suppliers. As they summarize, "The personal importation limitation discriminates against wine and beer *purchased* out of state." This argument has not been rendered moot, and we need to set forth the governing principles of the Commerce Clause and the Twenty-first Amendment before addressing it.

A

The Commerce Clause states that Congress "shall have the Power . . . To regulate Commerce . . . among the several states." U.S. Const. art. I, § 8, cl. 3. It is well established that this affirmative grant of authority implies a "negative" or "dormant" constraint on the power of the States to enact legislation that interferes with or burdens interstate commerce.

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[2] The ABC Act contains another exception to the three-tier structure, which is neutral to the issues in this case. Section 4.1-112.1(A) of the Virginia Code authorizes wine and beer shippers to obtain licenses to sell and ship directly to consumers for personal consumption not more than two cases of wine or beer per month. Both in-state and out-of-state wineries and breweries may obtain such licenses.

*Dennis v. Higgins*, 498 U.S. 439, 447 (1991) ("It is also clear, however, that the Commerce Clause does more than confer power on the Federal Government; it is also a substantive restriction on permissible state regulation of interstate commerce" (internal quotation marks omitted)); *Healy v. Beer Institute, Inc.*, 491 U.S. 324, 326 n.l (1989) ("This Court long has recognized that this affirmative grant of authority to Congress also encompasses an implicit or 'dormant' limitation on the authority of the States to enact legislation affecting interstate commerce"). A state law that discriminates against interstate commerce is the paradigm of legislation prohibited under the Commerce Clause, *see Brown-Forman Distillers Corp. v. New York State Liquor Auth.*, 476 U.S. 573, 579 (1986), where discrimination is defined simply as "'differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter.'" *Beskind*, 325 F.3d at 514 (quoting *Oregon Waste Sys. Inc. v. Dep't of Environmental Quality*, 511 U.S. 93, 99 (1994)).

In applying the dormant Commerce Clause to state alcohol regulations, we must also take into consideration the Twenty-first Amendment, which was ratified in 1933, repealing the Eighteenth Amendment and ending this country's experiment with Prohibition. Section 2 of the Amendment provides that:

> The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

The Twenty-first Amendment was designed to protect certain "core interests" of the States in "'promoting temperance, ensuring orderly market conditions, and raising revenue" through regulation of the manufacture, distribution, and sale of alcoholic beverages. *Beskind*, 325 F.3d at 513 (quoting *North Dakota v. United States*, 495 U.S. 423, 432

(1990)). To accomplish that end, "some power to regulate interstate commerce was withdrawn from Congress so that the Commerce Clause could not be construed to prevent the enforcement of State laws regulating the importation of alcoholic beverages and the manufacture and consumption of alcoholic beverages within State borders." *Id.* The Twenty-first Amendment thus provided the States with authority to enact legislation affecting interstate commerce, but it left unsettled whether, and to what extent, the States were subject to the nondiscrimination principle of the Commerce Clause in promoting their core interests.

In *Beskind*, which involved a challenge to North Carolina's ABC laws, which discriminated against out-of-state wine producers by allowing only in-state wineries to sell wine directly to consumers, we interpreted the Supreme Court's Twenty-first Amendment cases as establishing a two-part analytical framework for determining whether state alcohol regulations were permissible. We first considered "whether the purported State regulation violates the Commerce Clause without consideration of the Twenty-first Amendment," and, second, if it did, we then asked whether the "'principles underlying the Twenty-first Amendment [were] sufficiently implicated by the [State regulation] . . . to outweigh the Commerce Clause principles that would otherwise be offended." *Id.* at 513-514 (second alteration in original) (quoting *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 275 (1984)).

Since our decision in *Beskind*, the Supreme Court has modified this analytical framework, preserving the first inquiry but narrowing the second, at least when economic protectionism is at issue. In *Granholm*, which invalidated direct-shipment prohibitions in Michigan and New York's laws — similar to the North Carolina laws struck down in *Beskind* and the provisions mooted here by Virginia's recent legislation — the Supreme Court affirmed that the first step in reviewing state alcohol regulations is to determine whether

they discriminate against interstate commerce in violation of the Commerce Clause. 544 U.S. at 476. If the regulations do violate the Constitution in that manner, they are not automatically saved by the Twenty-first Amendment. *Id.* at 486-87. The Court rejected the view that the Twenty-first Amendment allows "States to regulate the direct shipment of wine on terms that discriminate in favor of in-state producers," *id.* at 476, and concluded that "[t]he [Twenty-first] Amendment did not give States the authority to pass *nonuniform* laws in order to discriminate against out-of-state goods, a privilege they had not enjoyed at any earlier time." *Id.* at 484-85 (emphasis added).

A discriminatory state law can, however, still be upheld by applying Commerce Clause jurisprudence — determining whether the state regulations reasonably advance legitimate state interests "that cannot be adequately served by reasonable nondiscriminatory alternatives." *Id.* at 489 (internal quotation marks omitted). Thus, the Supreme Court has made clear that the same "exacting standard" that applies to discriminatory state regulations in other contexts applies to state alcohol regulations, such that discrimination in violation of the dormant Commerce Clause can be upheld "only after finding, based on concrete record evidence, that a State's nondiscriminatory alternatives will prove unworkable." *Id.* at 493.

In *Granholm*, the Supreme Court applied those principles in concluding that the laws of Michigan and New York, which allowed local wineries, but not out-of-state wineries, to ship directly to retailers and consumers, violated the dormant Commerce Clause. The "differential treatment" between in-state and out-of-state wineries was held to constitute an indefensible "discrimination against interstate commerce." 544 U.S. at 467; *see also id.* at 476. But the court also noted repeatedly that the commonplace three-tier systems themselves did not violate the Constitution. It observed that it is "unquestionably legitimate" for a State to bar the importation

of alcoholic beverages or to "funnel sales through the three-tier system." *Id.* at 489; *see also id.* ("State policies are protected under the Twenty-first Amendment when they treat liquor produced out of state the same as its domestic equivalent").

**B**

As we have already noted, the core of plaintiffs' challenge to the Personal Import Exception — which was based on the fact that Virginia wineries could sell unlimited amounts of wine directly to consumers, while out-of-state wineries could only sell one gallon or four liters to consumers for personal import — has been rendered moot by Virginia's recent statutory enactments.

Nonetheless, the plaintiffs continue to argue, in challenging the Personal Import Exception, that it "operates to advantage all in-state entities that sell directly to consumers . . . over out-of-state *counterparts*." (Emphasis added). Because only *retailers* in Virginia may now sell directly to consumers, this argument must be that in-state *retailers* are favored over out-of-state *retailers*.[3] But an argument that compares the status of an in-state retailer with an out-of-state retailer — or that compares the status of any other in-state entity under the three-tier system with its out-of-state counterpart — is nothing different than an argument challenging the three-tier system itself. As already noted, this argument is foreclosed by the Twenty-first Amendment and the Supreme Court's decision in *Granholm*, which upheld the three-tier system as "unquestionably legitimate." As the ABC Act now stands, *all* out-of-state suppliers of wine are required by Virginia to sell

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[3] Again, as noted in footnote 2, above, wine and beer shippers, both in-state and out-of-state, may obtain a shipper's license authorizing them to sell and ship two cases of wine per month directly to consumers for personal consumption. *See* Va. Code § 4.1-112.1(A).

in Virginia through the three-tier system (except for the two-case exception of § 4.1-112.1(A)), and the Personal Import Exception to that import restriction does not favor in-state wineries. Indeed, it favors the out-of-state wineries insofar as one gallon or four liters of wine may be imported into Virginia outside of the three-tier structure, whereas in-state wineries can sell only through the three-tier structure or from their own retail premises for which they must obtain a separate retail license.

The plaintiffs' only remaining argument against the Personal Import Exception is that in limiting consumers to *importing* one gallon or four liters of out-of-state wine, Virginia "discriminates against wine and beer *purchased* out of state" because "Virginia imposes no restriction on how much wine or beer residents can *purchase* from in-state retailers." This argument rests on the syllogism that (1) because *imports* are limited to one gallon or four liters, out-of-state purchases are limited in the same way; (2) yet, in-state *purchases* are not limited to one gallon or four liters; and (3) therefore, the import limitation discriminates against out-of-state purchases. The logic of the argument, however, rests on at least two errors.

*First*, the plaintiffs' comparison assumes that the regulation of the quantity of wine that may be *imported* into Virginia is a surrogate for the regulation of the quantity of wine that may be *purchased* outside of the State. But it does not follow logically (nor factually) that a restriction on importation effects a restriction on out-of-state purchases. Second, even if *importation* were a surrogate for out-of-state *purchases*, the argument improperly compares unlike market functions. After claiming that the *import* limitation is the equivalent of a limitation on out-of-state *purchases*, plaintiffs then compare the one gallon/four-liter out-of-state wine purchases from wineries with purchases of unlimited amounts from in-state retailers. But in comparing these different purchases — restricted out-of-state purchases from wineries

with unrestricted in-state purchases from retailers — the plaintiffs overlook the fact that Virginia's ABC Act authorizes the purchase of *unlimited* quantities of alcoholic beverages out-of-state, which then may be imported into the State *through the three-tier structure.* And it is only the purchases of unlimited amounts through the three-tier structure, not through the one-gallon/four-liter exception to the structure, that may be compared with the unlimited amounts that may be purchased in state from retailers.

Under the ABC Act, Virginia regulates all *sales* of wine and beer in Virginia, but it does not regulate any sales outside of Virginia. Virginia regulates all *imports* of wine and beer into Virginia without regulating the prior sales of that wine and beer. The Personal Import Exception is an exception only to its generally applicable *import* regulation. Thus, an *import* regulation is quite distinct and different from a sales regulation, and comparing in-state sales with importation cannot give rise to a legitimate comparison for determining discrimination. The only fair comparison would be how the statute treats in-state *sales* and out-of-state *sales*, or in-state *wineries* and out-of-state *wineries*, or in-state *product* and out-of-state *product.*

The Personal Import Exception places no restriction on the amount of wine a person may purchase, either inside or outside Virginia. It also permits any person to import unlimited amounts of wine into the state through the three-tier structure. Where it does make an exception — allowing the import of a gallon or four liters of wine without going through the three-tier structure — it tends to favor, not discriminate against, interstate commerce because a consumer can buy one gallon or four liters of wine directly from a winery in another State and personally carry the wine into Virginia for consumption without comporting with the three-tier system or going through a retailer. The same consumer, however, cannot buy a similar quantity of wine directly from an in-state winery; the consumer would have to purchase all

such wine from an in-state retailer. The Personal Import Exception is, at bottom, only an exception for small amounts of wine that need not be imported through the three-tier structure, and this benefit is afforded to both Virginians and non-residents.

Because the Twenty-first Amendment "grants the States virtually complete control over whether to permit importation or sale of liquor and how to structure the liquor distribution system," *Granholm*, 544 U.S. at 488 (quoting *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 110 (1980)), and because the dormant Commerce Clause only prevents a State from enacting regulation that favors in-state producers and thus discriminates *against* interstate commerce, the Personal Import Exception does not violate the Clause.

**C**

In addition, the Personal Import Exception is justified as an appropriate regulation under the Twenty-first Amendment that is not denied legitimacy by being "economic protectionism," as was condemned by the holdings of *Granholm* and *Bacchus*.

In *Granholm*, the Supreme Court struck down state laws in Michigan and New York that regulated the import of wine into the states and that, at the same time, allowed in-state wine producers to sell wine directly to consumers. Characterizing the laws as "straightforward attempts to discriminate in favor of local producers," 544 U.S. at 489, the Court pointed out that the Twenty-first Amendment's purpose was not "to favor local liquor industries," *id.* at 487 (quoting *Bacchus*, 468 U.S. at 276). The purpose of the Twenty-first Amendment was "to allow States to maintain an effective and uniform system for controlling liquor by regulating its transportation, importation, and use." *Id.* at 484.

Similarly in *Bacchus*, the Court struck down a Hawaiian law that exempted local wine from the State's 20% excise tax as "economic protectionism." The Court rendered its holding in response to the following question:

> The question in this case is thus whether the principles underlying the Twenty-first Amendment are sufficiently implicated by the exemption for okolehao and pineapple wine to outweigh the Commerce Clause principles that would otherwise be offended. Or as we recently asked in a slightly different way, "whether the interests implicated by a state regulation are so closely related to the powers reserved by the Twenty-first Amendment that the regulation may prevail, notwithstanding that its requirements directly conflict with express federal policies."

468 U.S. at 275-76 (quoting *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 714 (1984)). The Court concluded that economic protectionism was not justified by the Twenty-first Amendment. "Here, the State does not seek to justify its tax on the ground that it was designed to promote temperance or carry out any other purpose of the Twenty-first Amendment, but instead acknowledges that the purpose was 'to promote a local industry.'" *Id.* at 276.

In short, these cases stand for the proposition that a State's regulation of the transportation, importation, and use of alcoholic beverages in the State is protected by the Twenty-first Amendment, but economic protectionism is not and otherwise violates the dormant Commerce Clause.

While the favoritism shown by Virginia in this case to local wineries by allowing them to sell directly to consumers did amount to economic protectionism that violated the dormant Commerce Clause, the Commonwealth's interest in otherwise regulating the importation, transportation, and use of wine in Virginia is protected by the Twenty-first Amendment. It is readily apparent that the Personal Import Excep-

tion is not economic protectionism but part of Virginia's import regulation. It provides a *de minimis* exception to Virginia's import regulations, allowing consumers to import one gallon or four liters of wine for personal consumption. Under no economic construct could such a provision be considered economic protectionism of local industry. To the contrary, it actually amounts to disadvantage local wineries whose wine may only be purchased through retailers. Accordingly, we hold that, for this additional reason, the Personal Import Exception does not violate the dormant Commerce Clause.

## IV

The plaintiffs also contend that Virginia's restriction authorizing ABC stores to sell only wine "produced by [Virginia] farm wineries,"[4] *see* Va. Code § 4.1-119(A), impermissibly discriminates against wines produced outside the Commonwealth, in violation of the dormant Commerce Clause.

Virginia does not deny that its ABC Stores Restriction discriminates against out-of-state wines but claims that its policy of selling only in-state wines through its own stores is

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[4] The ABC Act defines "farm winery" as

> an establishment (i) located on a farm in the Commonwealth with a producing vineyard, orchard, or similar growing area and with facilities for fermenting and bottling wine on the premises where the owner or lessee manufactures wine that contains not more than 18 percent alcohol by volume or (ii) located in the Commonwealth with a producing vineyard, orchard, or similar growing area or agreements for purchasing grapes or other fruits from agricultural growers within the Commonwealth, and with facilities for fermenting and bottling wine on the premises where the owner or lessee manufactures wine that contains not more than 18 percent alcohol by volume.

Va. Code § 4.1-100.

protected under the "market participant" exception to the dormant Commerce Clause.

The district court rejected this defense, holding that the Commonwealth's dual role as regulator and competitor in the market for alcoholic beverages undermines its status as a constitutionally protected market participant. *See Bolick I*, 199 F. Supp. 2d at 447-49 ("The state is therefore both a regulator and a competitor which prevents application of the market participant exception in regard to the state's sale of wine because the Commerce Clause acts as an implied restraint upon state regulatory powers . . . involving interstate commerce" (internal quotation marks omitted) (alteration in original)). Virginia contends that the district court simply erred as a matter of law because "[t]here is nothing in the jurisprudence of the Supreme Court or this Court that suggests that the Market Participation Exception does not apply in situations where the government is acting as a regulator of the products that it is selling or purchases."

Before applying the dormant Commerce Clause to State activities that burden or discriminate against interstate commerce, a court must determine whether the State "is acting as a market *participant*, rather than as a market regulator." *South-Central Timber Development, Inc. v. Wunnicke*, 467 U.S. 82, 93 (1984) (emphasis added). If the State is a valid market participant, "the dormant Commerce Clause places no limitation on its activities." *Id.* This market participant exception "makes sense because the evil addressed by [the dormant Commerce Clause] — the prospect that States will use custom duties, exclusionary trade regulations, and other exercises of governmental power (as opposed to the expenditure of state resources) to favor their own citizens — is entirely absent where the States are buying and selling in the market." *College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 685 (1999) (citation omitted).

The line of cases applying the market participant exception establishes this principle both clearly and consistently. In *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794 (1976), the Court held that the State of Maryland could pay local sellers of automobile scrap above-market rates for the scrap even though the State's activity potentially reduced the export of automobile scrap from Maryland. The Court held that "[n]othing in the purposes animating the Commerce Clause prohibits a State . . . from participating in the market and exercising the right to favor its own citizens over others." *Id.* at 810. In *Reeves, Inc. v. Stake*, 447 U.S. 429 (1980), the Court approved of South Dakota's decision to limit the sale of cement from a state-owned facility to South Dakotans. And in *White v. Massachusetts Council of Construction Employers, Inc.*, 460 U.S. 204 (1983), the Court held that the Mayor of Boston was participating in the construction market when he ordered that buildings funded from the public fisc could only be constructed by work forces, at least 50 percent of which were city residents. Although the Court recognized the existence of some limits "on a state or local government's ability to impose restrictions that reach beyond the immediate parties with which the government transacts business," it did not articulate those limits because everyone in the construction labor market who was affected by the Mayor's order was, "in a substantial if informal sense, 'working for the city.'" *Id.* at 211 n.7.

The Court did, however, define some limits to the market participation exception in *South-Central Timber*, in which a plurality held that the State of Alaska could not, as a condition of sale, require the purchasers of its unprocessed timber to process it in-state. Even though the Court reaffirmed "the principle that the Commerce Clause places no limitations on a State's refusal to deal with particular parties when it is participating in the interstate market in goods," 467 U.S. at 94, it limited the scope of the principle *to the market* in which the State was participating. The Court recognized that the State

was a participant in the timber market but was not a participant in the downstream market of timber-processing. And, unlike the construction workers in *White*, the timber purchasers could not be deemed State employees. The Court concluded that because the State did not participate as an economic competitor in the downstream timber-processing market in which its restrictions nevertheless had a significant effect, the State's conditions amounted to impermissible regulation.

These cases stand for the principle that the market participation exception applies to protect discriminatory conduct when the State acts like a participant in the relevant market. *Cf. South-Central Timber*, 467 U.S. at 96 (noting that, in the commercial context, "the seller usually has no say over, and no interest in, how the product is to be used after sale"). States, therefore, have the freedom to make discriminatory decisions while acting in a market, but they cannot impose any terms or conditions "that have a substantial regulatory effect outside of that particular market" to achieve by contract what the dormant Commerce Clause would forbid them to achieve by statute. *Id.* at 97.

As evidenced by the ABC Stores Exception, § 4.1-119(A) of the ABC Act, Virginia has elected to sell beer and wine, as well as some related products — along with liquor — from state-owned and operated stores. And just as the Commonwealth has elected not to sell every brand of liquor manufactured, it has elected not to sell out-of-state wines, choosing instead to sell only Virginia-produced wines. In doing so, it competes as a participant in the Virginia wine market with the thousands — more than 10,000, according to Virginia — of other private wine retailers who sell both Virginia wines and out-of-state wines in Virginia. Virginia's choice of selling only Virginia wine is no more inappropriate than would be its choice to sell only Hershey's brand chocolate bars at a State commissary. Like all other in-state wine retailers, the ABC stores can choose which wines they pur-

chase and stock, and Virginia's commitment to purchase only in-state wines is a choice that any wine retailer would be free to make for itself. This choice is indistinguishable from Maryland's choice in *Alexandria Scrap*. Just as Maryland favored in-state sellers when it purchased automobile scrap at high prices, Virginia favors in-state wines in its stores.

The plaintiffs contend that the ABC Stores Restriction falls outside of the Supreme Court cases delineating the market participation exception. They rely on two arguments to support that conclusion: (1) that the exception does not apply when a State acts as a "pervasive market regulator" that establishes a "channel of commerce that it itself controls to disadvantage out-of-state interests even when other private, competing channels of commerce exist," and (2) that the exception does not apply when a State "is simply trying to leverage its market power in one domain to achieve otherwise prohibited *regulatory* power in another." The plaintiffs contend that because Virginia maintains a monopoly on the sale of hard liquor, being the only seller of hard liquor in Virginia, it is attempting to use that monopoly to gain a competitive advantage for wines produced within the Commonwealth. We address these arguments *seriatim*.

**A**

The plaintiffs rely on *South-Central Timber* to argue that States may not simultaneously regulate and participate in a market: "The fact that the Virginia ABC Board pervasively regulates the market it participates in forecloses application of the market participant exception here. Its role as regulator constitutionally overshadows its role as participant." The plaintiffs, however, misread *South-Central Timber*.

In *South-Central Timber*, Alaska, in selling timber, required that the purchaser of the timber process the timber in Alaska before shipping it outside of the State. The Supreme Court did not deny Alaska the right to sell the timber as a market participant to whomever it chose and at whatever

price. Rather, as the Court noted, Alaska was attempting to impose "conditions downstream in the timber-processing market." *Id.* at 95. The Court explained, "In the commercial context, the seller usually has no say over, and no interest in, how the product is to be used after sale." *Id.* at 96. Summarizing its rejection of Alaska's condition as impermissible for a market participant, the Court stated, "The limit of the market-participant doctrine must be that it allows a State to impose burdens on commerce within the market in which it is a participant, but allows it to go no further." *Id.* at 97 (emphasis added). Contrary to the plaintiffs' argument, the holding of *South-Central Timber* leaves the market participant free to burden or discriminate in the market in which it participates, even if it also regulates the market.

State regulation of markets across the country is pervasive; most States, if not all, have general market regulations, such as unfair trade practices laws. If the mere fact of regulation precluded applying the market participant exception, no State would ever qualify. Plaintiffs thus must argue that the State cannot participate in a market when it pervasively regulates that specific market.

But the Supreme Court has approved applying the market participant exception even when a State's regulations are trained on the specific market in which it participates. This was the situation in *Alexandria Scrap*, in which the State of Maryland not only participated in the automobile scrap market, but, through the same legislation authorizing above-market purchases from in-state scrap sellers, also required those sellers to "obtain a license and pay a recurring fine" if they did not sell their scrap to willing purchasers, including Maryland. *See Alexandria Scrap*, 426 U.S. at 797; *see also Chance Mgmt., Inc. v. South Dakota*, 97 F.3d 1107, 1113 (8th Cir. 1996) (finding that, despite South Dakota's heavy regulation of the state lottery and all other forms of gambling, the State's pervasive involvement in running the lot-

tery was not "regulation of 'the market,'" but rather was no more than "administering its own business").

The fact that Virginia regulates the alcohol market is not sufficient to preclude its status as a market participant. To contravene the dormant Commerce Clause, a State must do more than regulate markets in which its participation happens to favor local interests. The State acts unconstitutionally when its participation in one market results in regulation of another market in which it does not participate. That cannot be said of Virginia's decision to sell only Virginia wines from its own retail stores as its participation in the wine market has no regulatory effects on other markets.

**B**

The plaintiffs also contend that the ABC Stores Restriction falls outside the market participant exception because the State sells in-state wines in the same stores as hard liquor, thereby "leverag[ing] its market power in one domain" — the hard liquor market in which it has a monopoly — "to achieve otherwise prohibited regulatory power in another" — the wine market. To support this "leveraging" claim, the plaintiffs argue that, if Virginia licensed private retailers to sell liquor rather than state-run ABC stores, it could not pass a law allowing the private stores to sell only Virginia wines. That would discriminate against out-of-state wines in violation of the dormant Commerce Clause.

We find this "leveraging" argument, and the hypothetical reasoning advanced to support it, both misleading and irrelevant. The hypothetical is misleading because it involves state *regulation* of *private* businesses competing in the wine market and not state *participation* in that market, fatally assuming away the prerequisites of the market participant exception; and it is irrelevant because Virginia does not prohibit privately-owned stores from selling out-of-state wines. Indeed, as the plaintiffs concede, there are thousands of retail outlets at which consumers may purchase both out-of-state

and Virginia-produced wines at fully competitive prices. Furthermore, there is no evidence in the record to suggest that Virginia's sale of Virginia farm wines at ABC stores interferes with or burdens the free and competitive market in both in-state and out-of-state wines. There is no evidence that consumers face any impediment to purchasing wines of their preference at fair market prices. This lack of evidence is particularly relevant given the district court's finding that "the consumer who prefers to purchase an out-of-state or foreign vintage, as well as distilled spirits which are only available at state stores, is deterred from buying his favorite wine after he buys his liquor because of the inconvenience involved in going to a separate source."

While there is no evidence in the record to support any claim of consumer deterrence, the Commonwealth nonetheless cannot be barred from making business choices that favor local interests on the ground that some consumers might be inconvenienced. Any choice to sell one brand or type of product rather than another could have that result. If the Commonwealth maintained its monopoly on hard liquor and authorized its ABC store managers to stock *both* in-state and out-of-state wines, the ABC store manager's choice to purchase and sell only a limited array of brands and types of wine would still inconvenience consumers who wanted to purchase what the manager failed to select. On the district court's theory and according to the plaintiffs, so long as the Commonwealth maintains its lawful monopoly in hard liquor, it could not sell *any* wines because to do so would inconvenience consumers who prefer some alternative.

The cases establishing the market participant exception do not compel that conclusion and, in fact, militate against it. They stand for the proposition that a State may engage as a competitor in a free and open market, making business choices to buy and sell goods, even if those choices favor local products. And that is all that Virginia has done here; it sells in-state wines from its ABC stores in a fully competi-

tive wine market. *See Reeves*, 447 U.S. at 437 ("There is no indication of a constitutional plan to limit the ability of States themselves to operate freely in the free market"). And its doing so does not regulate the sale of wines in Virginia by other stores.

The dissent's argument — which has not been advanced by the plaintiffs — that because Virginia has a monopoly in the sales of hard liquor, it somehow cannot be a participant in the market for the sale of wine because the "relevant market" is a single market for the sale of both "wine and liquor," is flawed for several reasons. First, it is a non-sequitur to conclude that Virginia does not compete in the sale of wine because it has a monopoly in the sale of hard liquor. Second, the dissent's reliance on Virginia's supposed market control of a single market consisting of wine and liquor does not take into account the fact that consumers can purchase wine not only from ABC Stores but also from over 10,000 private retailers throughout the Commonwealth. Third, if the dissent suggests that Virginia has a monopoly for stores where one can buy both wine and liquor, that says nothing about a relevant market. Simply because a retailer sells two different products from the same location when no other retailer sells the same two products does not make the retailer a monopolist in a joint "market," and this is true even if no other retailer sells one of the products. These are matters of convenience, not monopoly power. Finally, there is no evidence in the record to support the dissent's single market theory in an economic sense. The dissent cannot legitimately argue that, based on an intuited assumption, consumers demanding a bottle of whiskey or vodka will fulfill that demand by buying a bottle of wine or that consumers demanding a bottle of wine will fulfill that demand by buying a bottle of whiskey or vodka. Common sense compels a conclusion that there simply is no cross-elasticity of demand to justify concluding that there is a single market consisting of wine and liquor.

As the record stands, a fully competitive market exists in Virginia for the sale of wine, and Virginia's ABC Stores are but one class of retailer that participates in that market.

## V

Finally, we address Virginia's contention that the plaintiffs cannot bring their dormant Commerce Clause challenges under 42 U.S.C. § 1983, and that, consequently, the plaintiffs do not qualify to make a claim for attorneys fees under 42 U.S.C. § 1998, if they satisfy that provision. Specifically, Virginia claims that, in *Gonzaga University v. Doe*, 536 U.S. 273 (2002), the Supreme Court narrowed the scope of § 1983 actions to only those claims based on an "unambiguously conferred right." Virginia contends that the Commerce Clause does not confer individual rights and so cannot form the basis of a § 1983 action.

This claim, however, overlooks *Dennis v. Higgins*, 498 U.S. 439 (1991). In *Dennis*, the Supreme Court resolved a conflict among the circuits on precisely this question, holding that, in addition to allocating power between the federal and state governments, the Commerce Clause confers "'a right which every citizen of the United States is entitled to exercise under the Constitution and laws of the United States.'" *Id.* at 448 (quoting *Crutcher v. Kentucky*, 141 U.S. 47, 57 (1891)); *see also Medigen of Kentucky, Inc. v. Pub. Serv. Comm'n*, 985 F.2d 164, 167 n.3 (4th Cir. 1993) (applying Dennis and holding that "Commerce Clause violations [are) actionable under § 1983"); *Yamaha Motor Corp. v. Jim's Motorcycle, Inc.*, 381 F. Supp, 2d 499, 502 (ED. Va. 2005) (Payne, J.) (noting that "*Gonzaga* does not overrule Higgins and that the Fourth Circuit has applied *Higgins* in reaching the same result").

Given that *Gonzaga* did not expressly overrule Dennis, Dennis remains controlling authority. We have previously acknowledged the Supreme Court's instruction that "'[i]f a precedent of this Court has direct application in a case, yet

appears to rest on reasons rejected in some line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.'" *Nat'l Home Equity Mortgage Ass'n v. Face*, 283 F.3d 220, 224 (4th Cir. 2002) (alteration in original) (quoting *Agostini v. Felton*, 521 U.S. 203, 237 (1997) (internal quotation marks omitted)). Not only has Virginia failed to show that Gonzaga *sub silentio* overruled *Dennis*, but it has also provided no authority authorizing us to ignore directly controlling Supreme Court precedent that has not been overruled.

## VI

In sum, we affirm the district court's ruling that plaintiffs may bring their Commerce Clause challenges under 42 U.S.C. § 1983; we reverse the district court's judgment holding unconstitutional the Personal Import Exception and the ABC Stores Restriction; and we dismiss as moot the appeal and cross-appeal insofar as these appeals relate to provisions of the ABC laws amended by the Virginia legislature effective July 1, 2006, vacate the relevant judgment of the district court, and remand with instructions to dismiss plaintiffs' challenges to these provisions.

*AFFIRMED IN PART; REVERSED IN PART; AND DISMISSED IN PART, VACATED AND REMANDED*

TRAXLER, Circuit Judge, concurring in part and concurring in the judgment:

I concur in the judgment, and I concur in all but part III(B) of the excellent opinion written by Judge Niemeyer.

GOODWIN, District Judge, concurring and dissenting:

I concur in Parts I, II, and V of the majority opinion. I respectfully dissent from Parts III and IV. I would affirm the district court's conclusion that the Personal Import Exception[1] and ABC Stores Restriction[2] are unconstitutional.

I.

In *Granholm v. Heald*, 544 U.S. 460 (2005), the Supreme Court adopted a framework for examining whether state liquor laws violate the dormant Commerce Clause. The Court responded to lower court decisions finding the Twenty-First Amendment could, in some situations, save state liquor laws that discriminated against interstate commerce. Our opinion in *Beskind v. Easley*, 325 F.3d 506 (4th Cir. 2003), was such a decision. In *Beskind*, we held that when considering a state liquor law, we first examine whether the law violates the dormant Commerce Clause. *Beskind*, 325 F.3d at 513. If so, we explained we then look to the "principles underlying the Twenty-first Amendment" to determine if they are sufficiently implicated by the law "to outweigh the Commerce Clause principles that would otherwise be offended.' *Beskind*, 325 F.3d at 513-14 (quoting *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 275 (1984)).

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[1] The Personal Import Exception allows individual consumers to import one gallon (or four liters) of wine and beer into Virginia without having to pass through the three-tier distribution system. Va. Code § 4.1-310(E).

[2] The ABC Stores Restriction prevents ABC stores from marketing and selling any wine not produced by Virginia "farm" wineries. *Id.* § 4.1-119(A).

I believe the majority opinion misconstrues the effect that the Supreme Court's decision in *Granholm* had on the analytical framework we constructed in *Beskind*. The majority reads *Granholm* as only modifying that framework. The majority explains, "the Supreme Court has modified th[e] [*Beskind*] framework, *preserving the first inquiry but narrowing the second*." Op. at 15 (emphasis added). In my view, *Granholm* does not narrow, but rather completely eliminates consideration of *Beskind's* "second inquiry."

Quite simply, I read *Granholm* as requiring us to apply the same dormant Commerce Clause analysis to discriminatory liquor laws that we apply to other discriminatory laws. *Granholm*, 544 U.S. at 476. We do not consider the principles of the Twenty-first Amendment. *See id.* at 487-88 ("[T]he Twenty-first Amendment does not supersede other provisions of the Constitution.").

It is clear, however, that because the majority believes the Personal Import Exception does not discriminate against interstate commerce, the majority's constitutional conclusion would be the same even under my conception of the proper articulation of the change effected by *Granholm*.

**II.**

The majority concludes that to find the Personal Import Exception unconstitutional, we also would have to find Virginia's three-tier distribution system unconstitutional. I disagree. The discriminatory effect of the Personal Import Exception occurs *after* the beverages have passed through Virginia's three-tier system. It is at this stage, when the alcoholic beverages are on the shelves ready for market, that interstate commerce is impermissibly impeded. *See H.P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 535 (1949) ("[T]he 'negative' or 'dormant' aspect of the Commerce Clause prohibits States from 'advancing their own commercial interests by curtailing the movement of articles of commerce, either into or out of the State.'"). The law tilts the market in favor

of in-state retailers by preventing Virginians from having meaningful access to the markets of other States. *See Granholm*, 544 U.S. at 473 (finding state liquor laws unconstitutional because they "deprive *citizens* of their right to have access to the markets of other States on equal terms") (emphasis added).

I concede that a restriction on imports does not necessarily target out-of-state purchases. Obviously, a Virginian may buy the same amount of beer or wine in an out-of-state store as may a purchaser from any other State. In theory then, Virginia consumers are not denied access to the markets of other States because they are free to purchase the same amounts as other consumers. In reality, however, because Virginians may not carry more than a gallon of what they buy into Virginia, they are denied access to other States' markets on equal terms with other consumers. Having an opportunity to purchase is not the equivalent of having meaningful market access. Such access requires not only that a consumer be able to purchase a product, but also that the consumer be able to use it. By preventing importation into Virginia, the Personal Impart Exception impedes interstate commerce.

Consider this example: Mr. Smith lives in Bristol, Virginia, a town on the Virginia/Tennessee border. He wants to purchase a 12-pack of beer. The closest place he can buy beer is just across West State Street in Tennessee. The closest store in Virginia is nearly twice as far from Mr. Smith's house. The Personal Import Exception deprives Mr. Smith of meaningful access to the conveniently located Tennessee retailer merely because it is located across the state line. To buy more than one gallon of beer (128 ounces), Mr. Smith must go to a Virginia store. Mr. Smith presumably could go to Tennessee and buy a 12-pack (approximately 144 ounces), but would have to either discard or drink two of the beers before crossing the street back into Virginia. The import restriction prevents Virginians from meaningfully participating in

the markets of other States. As a result, the restriction impermissibly impedes interstate commerce.

The Commonwealth argued that because *Granholm* noted that a State could completely bar the importation of alcohol, it follows that a law limiting alcohol importation is clearly permissible. *Granholm*, however, plainly indicates that a complete bar could be enacted only in "[a] State which chooses to ban the sale and consumption of alcohol altogether." *Granholm*, 544 U.S. at 488-89 (emphasis added). Virginia has not prohibited either the sale or consumption of alcohol *altogether*.

Virginia's limitation on the quantity of alcoholic beverages a person may bring into the Commonwealth favors in-state economic interests over out-of-state economic interests. As *Granholm* explains, "Time and again [the Supreme Court] has held that, in all but the narrowest circumstances, state laws violate the *Commerce Clause* if they mandate 'differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter.'" *Id.* at 472 (quoting *Oregon Waste Sys., Inc. v. Dep't of Envtl. Quality*, 511 U.S. 93, 99 (I994)). Statutes with this effect are "generally struck down . . . without further inquiry." *Id.* at 487 (quoting *Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573, 579 (1986)). "State laws that discriminate against interstate commerce face 'a virtually per se rule of invalidity.'" *Id.* at 476 (quoting *Philadelphia*, 437 U.S. at 624)).

The Personal Import Exception can be saved only if the regulation "advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives." *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 278 (1988). Virginia argues the law advances two purposes: 1) it facilitates tax collection and 2) it controls the importation of bootleg liquor. Both of these interests may be adequately served by reasonable nondiscriminatory alternatives.

J.A. at 551 (As the Magistrate Judge below found, "the prohibition cannot be viewed as serving any legitimate core concern of the Twenty-first Amendment unless, of course, one concludes that transportation of unlimited quantities of alcoholic beverages acquired within Virginia necessarily has less potential for intemperance or other abuse than that acquired 'over the state line'"); *see also Granholm*, 544 U.S. at 489-92 (rejecting collecting tax revenue and protecting minors as legitimate local purposes for Michigan and New York laws).

Accordingly, I believe the Personal Import Exception is unconstitutional because it violates the dormant Commerce Clause.

## III.

The ABC Stores Restriction is also unconstitutional. Virginia concedes this law discriminates against out-of-state wines, but claims the "market participant" exception justifies the discrimination.

The majority finds the market participant exception applicable because Virginia is a competitor in the market for wine in Virginia. The majority, however, fails to accurately define the relevant market. Because ABC Stores are the only stores where consumers may purchase liquor in Virginia, these stores are the only places where consumers may purchase *wine and liquor* in the same place. A consumer's demand for purchasing both a bottle of liquor *and* a bottle of wine *at the same time* may be satisfied *only* in ABC Stores. The relevant market is not the market for *wine*, but the market for wine and *liquor*.

Virginia has granted itself a monopoly in the market for the *joint sale* of wine and liquor through its ABC Stores, and uses that monopoly to impermissibly discriminate against out-of-state wines. As a result, the market participant exception cannot justify the ABC Stores Restriction.

## IV.

Accordingly, I respectfully dissent from Parts III and IV of the majority opinion, and would find the Personal Import Exception and the ABC Stores Restriction unconstitutional.

## APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

PETER P. BROOKS, et al.,
Plaintiffs,
v.
VERNON M. DANIELSON, et al.,
Defendants.
Civil No. 3:99CV755

**ORDER**

This matter is before the Court to consider objections filed by the parties in response to the Report and Recommendation of the Magistrate Judge entered August 9, 2004. Having reviewed *de novo* the written objections to the specific portions of the proposed findings and recommendations as provided under 28 U.S.C. § 636(b)(1), it is hereby ORDERED that

(1) the Report and Recommendation of the Magistrate Judge is accepted and adopted except where expressly modified according to the accompanying Memorandum Opinion;

(2) the portions of the Virginia Code found to be unconstitutional are stricken in accordance with the Report and Recommendation of the Magistrate Judge except where expressly modified according to the accompanying Memorandum Opinion.

Let the Clerk of the Court forward a copy of this Order and the accompanying Memorandum Opinion to all counsel of record.

It is so ORDERED.

/ss/
Senior United States District Judge

Dated: Apr 27, 2005
Richmond, Virginia

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

PETER P. BROOKS, et al.,
Plaintiffs,
v.
VERNON M. DANIELSON, et al.,
Defendants.
Civil No. 3:99CV755

**MEMORANDUM OPINION**

This matter is before the court to consider objections filed by the parties in this matter in response to the Report and Recommendation of the Magistrate Judge (R. &. R. or Report) filed August 9, 2004. The Court must make a *de nova* determination of the objected-to portions of the Magistrate Judge's findings of fact and conclusions of law. 28 U.S.C. § 636(b)(1). Having considered the pleadings and the arguments therein, the Court finds that the Report and Recommendation of the Magistrate Judge should be accepted and adopted, except as otherwise explained in this opinion.

The Court has considered the matter as it was presented on remand under the mandate issued by the Fourth Circuit Court of Appeals in *Bolick v. Danielson*, 330 F.3d 274 (4th Cir. 2003). The Court is satisfied that the record has been fully developed and that the issues have been properly briefed. The Supreme Court of the United States is currently considering *Granholm v. Heald*, 03.1116; *Michigan Beer & Wine Wholesalers v. Heald*, 03-1120; and *Swedenburg v. Kelly*, 03-1274, which present the same fundamental question of constitutional law at issue here, to resolve the clash between the Commerce Clause and the Twenty-first Amendment. As of the date of this opinion, the Supreme Court has not issued its decision in those cases. This matter is ripe.

Plaintiffs' Objections

The Plaintiffs complain that the R. & R. does not adequately explain and justify its holding with respect to their fourth claim (the "permissions claim") — that Va. Code Ann. § 4.1-112.1(B), which requires out-of-state retailers, but not in-state retailers, to obtain permission from producers or brand owners in order to ship wine and beer to Virginia consumers, is unconstitutional. (Pls.' Objs. at 7). The Magistrate Judge found that the permissions requirement for out-of-state licensees was discriminatory when considered in conjunction with the statutory presumption that in-state licensees had brand-owner permission. (R. & R. at 28). The Plaintiffs specifically object to the Magistrate Judge's Twenty-first Amendment analysis as "short in several respects." (Pls.' Objs. at 10), The Plaintiffs have cited no persuasive authority to demonstrate that where the Magistrate Judge's recommendation is without error, the district court must expand or clarify the analysis. Nonetheless, in the interest of clarity in the event of an appeal, the Court will accept and adopt the conclusion but briefly expand the analysis.

The Magistrate Judge's report makes clear that a challenge under the dormant Commerce Clause is analyzed under "'the framework designed by the Supreme Court to answer this question, we determine first whether the purported state regulation violates the Commerce Clause without consideration of the Twenty-first Amendment.'" (R. & R.at 12, quoting *Beskind v. Easley*, 325 F.3d 509, 513 (4th Cir. 2003)). The Magistrate Judge found that, in combination, the permissions requirements discriminated against out-of-state interests in favor of in-state interests. (R. & R. at 17). Upon deciding that the statute is facially discriminatory in violation of the dormant Commerce Clause, the next step is to "'determine whether the principles underlying the Twenty-first Amendment are sufficiently implicated by the [State regulation] . . . to outweigh the Commerce Clause principles that would otherwise be offended.'" (R. & R. at 12). The Magis-

trate Judge found that Defendants claimed that the permissions requirement served a core concern needed to "ensure orderly market conditions." (R. & R. at 19). Standing alone, a permissions requirement might be constitutional. However, because the permissions requirement for in-state interests is not only different, but also less burdensome, than that required of out-of-state interests, the proffered "core concern" advanced by the Defendants is belied. The state could accomplish its goal of requiring brand-owner consent in a non-discriminatory way, especially where the Defendants have provided no proof that there is no other, non-discriminatory means of doing so. Once a Plaintiff demonstrates that a state law is discriminatory, the burden is on the Defendant to demonstrate that the discrimination serves a core interest and there is no other non-discriminatory means of protecting its interest. *Beskind*, 325 F.3d at 516-17. In this case, even if brand-owner permission served a core interest in a vacuum, the Defendants have not carried the burden of showing that the discriminatory treatment in supplying brand-owner permissions serves a core interest of any kind. More to the point, the Fourth Circuit has held that the Defendants cannot defend discriminatory treatment by arguing that it "can advance its regulatory purpose by imposing fewer burdens on in-state interests." *Id.* at 517. Rather, Defendants must demonstrate that the discrimination in favor of in-state interests serves a Twenty-first Amendment purpose. *Id.* The Plaintiffs also object that the R. & R. fails to address their claim that it is unconstitutional to allow in-state retailers but not out-of-state retailers to sell and deliver unlimited amounts of wine to Virginia consumers so long as they use their own means of transport. (Pls.' Objs. at 11). The Magistrate Judge recommends nullifying the provisions that discriminate in favor of in-state wineries and breweries, but does not apply its analysis to retailers in its final recommendation. (R. & R. at 21-22). To the extent that the R. & R. neglected to include retailers in Finding number 4, Issue number 3 and the final

analysis related to the "delivery privilege" enjoyed by wineries and breweries, the objection is sustained. The Court accepts and adopts the R. & R. as it relates to preferential delivery by wineries and breweries and modifies it to include retailers based upon the same reasoning.

Next, the Plaintiffs complain that the R. & R. overlooks that Plaintiffs' claims are filed under § 1983 that would allow them to recover their costs and reasonable attorney's fees as the prevailing parties under § 1988. (Pls.' Objs. at 12). It is axiomatic that §1983 grants no right other than to bring a civil action for violation of a constitutional or statutory right committed by a person acting under color of state law. 42 U.S.C. §1983. The Fourth Circuit applies Supreme Court precedent by allowing claims arising under the dormant Commerce Clause to be prosecuted pursuant to §1983 when a plaintiff can meet a two-part test. *Doe v. Broderick*, 225 F.3d 440, 447 (4th Cir. 2000). First, the plaintiff must actually have a "right" cognizable under § 1983 and, second, Congress must not have foreclosed enforcement of the right through § 1983. *Id.* The Supreme Court has recognized that cases for constitutional injury arising under the dormant Commerce Clause satisfy the tests required to state a claim for a right enforceable under § 1983. *Dennis v. Higgins*, 498 U.S. 439, 446 (1991). Therefore, the Plaintiffs' objection is sustained and to the extent that it is not explained in the R. &. R., the claims of constitutional injury in this action are construed to arise under § 1983.

Next, the Plaintiffs argue that the Magistrate Judge was wrong to recommend denying summary judgment to Plaintiffs on the two-case limit based on the belief that a genuine issue of material fact exists. (Pls.' Objs. at 17). The R. & R. focused on what is fairly construed as factual disputes concerning the effect of the two-case-per-month limit on out-of-state interests because of the burdens associated with the costs of shipping a perishable product. (Pls.' Objs. at 18). The Court finds no error in the Magistrate Judge's opinion

that the two-case-per-month limit is facially neutral and that to determine whether there exists discrimination in effect, a fact determination would be necessary.[1] Therefore, the objection is overruled.

The Plaintiffs object to the Magistrate Judge's proposed remedy to excise the in-state preferences instead of extending preferences to out-of-state entities. (Pls.' Objs. at 19). The Plaintiffs argue that in simply excising the in-state preferences, there is no uniform effect and thus there is a failure to remain consistently true to a "course that least destroys the regulatory scheme that [the legislature] has put into place pursuant to its powers under the Twenty-first Amendment." *Id.* (citing *Beskind*, 325 F.3d at 519). The Plaintiffs' argument has some merit especially because the Virginia legislature amended its Alcoholic Beverage Control Act (ABC Act) to permit the direct marketing of beer and wine to Virginia consumers by out-of-state breweries, wineries and retailers. (Pls.' Objs. at 1). It is reasonable to conclude that the legislature wished generally to expand the benefits it afforded to in-state interests to out-of-state interest in the direct marketing of beer and wine. However, the Court finds no error in the Magistrate Judge's recommendation that the proper remedy,

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[1] The Plaintiffs previously argued that the discriminatory effect is so blatant that it amounts to a facial violation. (Pls.' Mem. P. & A. Opp'n to Defs.' Mot. Summ. J. at 19)(docket entry #249). Recognizing that success on that argument was unlikely, Plaintiffs suggested in a footnote that if the Court found a fact dispute, their motion to amend this particular claim be denied so that the whole matter could be resolved on summary judgment. *Id.* at 20 n.9. Though the Magistrate Judge recommended the amendment be permitted and the Court finds no error, the Plaintiffs' suggestion has merit to bring finality to this phase of the case. The Plaintiffs' suggestion is construed to withdraw their claim based on the reasoning of this Memorandum Opinion affirming the Magistrate Judge's finding that the two-case-per-month provision presents questions of disputed fact regarding discriminatory effect.

the one that caused the least damage to the scheme, was to excise the in-state preferences. The General Assembly is free to revisit the ABC Act and constitutionally re-animate the benefits by either visiting equal burdens on in-state and out-of-state interests or by eliminating the burdens unnecessary to further its core concerns. Therefore, the Plaintiffs' objection regarding the remedy is overruled.

The Plaintiffs also object to the proposed remedy because "abolishing the in-state preference would create a class of criminals nowhere defined by state or federal law." *Id.* at 25. The Plaintiffs correctly argue that the federal courts are without the authority to create classes of criminals beyond that established by the legislature. *Liporata v. United States*, 471 U.S. 419 (1985). The Plaintiffs raise this issue "[a]lthough [it was] neither raised by the parties nor addressed by the Fourth Circuit in *Beskind*, any court's remedial powers must be exercised within applicable constitutional constraints" in support of their argument that the recommended remedies are improper. (Pls.' Objs. at 25). Instead, the Plaintiffs urge the Court to adopt the same approach it did in its final order in the "first round of litigation" by specifically finding that the challenged provisions are unconstitutional to the extent they place burdens on out-of-state wineries, breweries, and retailers relative to their in-state counterparts in violation of § 1983. *Id.* at 27 n.11. This approach, Plaintiffs argue, would evenhandedly extend to out-of-state entities the privileges and protections afforded to the in-state entities. *Id.* It is an interesting invitation, but one the Court ultimately declines to accept because the remedy recommended by the Magistrate Judge is in accord with the minimum damage approach applied in *Beskind* and therefore without error. The Court is not persuaded that the excision of the discriminatory language results in new, judge-made crimes. To the extent that any part of the remedy would be so construed, the General Assembly is free to once again re-write their ABC Act in a non-

discriminatory fashion. Therefore, the Plaintiffs' objection is overruled.

The Plaintiffs implore the Court to find that the Magistrate Judge improperly disposed of the Plaintiffs' evidentiary motions as moot while admitting the Wholesalers' improper evidence. (Pls.' Objs. at 27-28). The R. & R. explains in some detail the Magistrate Judge's reasoning concerning the evidence submitted by the parties. First, the Magistrate Judge decided it was unnecessary to rule with particularity on each and every objection raised but, instead, relied on the so-called "lens of Fed. R. Civ. P. 56," rather than require the material to be redacted, stricken or left in tact. (R. & R. at 5 n.6, citing *Brown v. Angelone*, No. Civ. A. 01-144-AM, 2002 WL 32502353, at *10 (ED. Va. Mar. 28, 2002). The Magistrate Judge further explained that the decision did not rest on challenged material. *Id.* (citing *El v. Tek Sys. Inc.*, 311 F.Supp.2d 516, 518 (ED. Va. 2002); and *Jordan v. Western Dist. Co.*, No. Civ. CCB-03-950, 2004 WL 1465804, at *2 n.3 (D.Md. June 25, 2004)). The Magistrate Judge noted that "[t]he court originally allowed extended discovery to provide the opportunity for the parties to explore . . . potentially relevant issues," and that "[t]he court was sorely mistaken that the discovery process would produce such relevant evidence." *Id.* at 6 n.7. The Magistrate Judge also summed up by writing, "[m]any, if not most, of the facts asserted by each party as undisputed were addressed in the court's earlier report and recommendation and resolved by the district court." *Id.* at 7 n.9.

The Court has considered the Plaintiffs' objections together with the objections of the Defendants and the Wholesalers addressed below. The record was fully developed in the "first round of litigation" and the case was ultimately resolved on the face of the statutes. Likewise on remand, with the exception of the two-case-per-month limit, the challenged provisions are facially void. The Court finds no error in the Magistrate Judge's decision to deny the evidentiary motions

as moot. Therefore, the Plaintiffs' objection is overruled. However, to the extent that it is relevant on appeal, the Court does not read any part of the R. & R. to affect the evidence admitted in the first round of litigation, nor does it appear to do anything but ignore nearly all the proffered evidence on remand — except, of course, to decide that a fact dispute existed with respect to the two-case-per-month limit.

The Plaintiffs have also objected to what they consider to be "technical" mistakes requiring "technical corrections." (Pls.' Objs. at 29). To the extent that it matters, the definitions of wineries and farm wineries found at Va. Code Ann. §§ 4.1- 207, 209, which speak for themselves, should be substituted for Finding 3 on page 8. The other technical corrections urged by the Plaintiffs involve the manner in which the Magistrate Judge suggested striking offending language from the challenged provisions. Having considered the Plaintiffs' suggestions, the Court finds no reason to further modify the Magistrate Judge's recommendation on the remedy. Except as otherwise expressly modified in this opinion, the Court finds that if it wishes to do so, it is up to the Virginia General Assembly to craft a non-discriminatory scheme in accordance with this holding. Therefore, the Plaintiffs' remaining objections are overruled.

Finally, the Plaintiffs point out that the R. & R. fails to recommend any disposition of the Wholesalers' Motion for Summary Judgment. Based on the reasoning of the R. & R. the objection is sustained and the Wholesalers' Motion for Sununary Judgment is justifiably

DENIED.

Defendants' Objections

Defendants object that the Court made jurisdictional errors. First, they argue that the wineries and retailer (Schneider Liquor Company, Inc.) Plaintiffs lack standing because none have a Virginia shippers license or Virginia retailers

license. (Commw. Objs. to Rep. & Recomm. at 4)(Commw. Objs.). Defendants also complain that the individual Plaintiffs lack standing because there is no evidence that they attempted to order wine or beer from Virginia licensed entities. (Commw. Objs. at 6).

The standing issue has been resurrected by the Defendants although it has been explained time and again by the Court throughout this litigation that consumers, retailers and producers have standing to challenge the Virginia scheme. (R. & R.at 15-16; Order, Feb. 7, 2000). The Defendants challenge the standing of parties added on remand. Although the Court granted leave to add parties on remand, the Defendants' renewal of their standing objection recycles earlier arguments that the Court previously ruled were without merit. In this action, winery and retail Plaintiffs challenge the Virginia statutes that make it impossible to engage in activity they claim is protected by the Constitution but prohibited by the Virginia statutes. A party must show it has standing by demonstrating that it has suffered an injury in fact (1) that is concrete and particularized as well as actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged acts; and (3) it is likely that the injury will be redressed by a favorable decision. *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180-81 (2000). In this case, all of the Plaintiffs base their constitutional claims on their roles as market participants. There is no requirement that the Plaintiffs engage in a futile or illegal act such as applying for a license or ordering a case of forbidden fruit simply to demonstrate the inevitable restraints on commerce imposed by the statute. *Mullins Coal Co. v. Clark*, 759 F.2d 1 I42, 1146 (4th Cir. 1985). Although the Plaintiffs' successful attack on the constitutionality of the scheme results in a remedy different from what they seek, the remedy nonetheless amounts to a redress of the injury because it eliminates the disparity that exists. *See Simon v. Eastern Ky.*

*Welfare Rights Org.*, 426 U.S. 26, 38 (1976). Therefore, the Defendants' objection based on standing is overruled.

Defendants argue that Plaintiffs should not have been allowed to amend their complaint which raises claims outside the scope of the 2003 legislative amendments. (Commw. Objs. at 6). For instance, the Court observes that the 2003 Amendments altered specific sections of the Act, but not the specific provisions authorizing the so-called delivery privilege for off-premises licensees found at Va. Code Ann.§§ 4.1-207 - 209. (Commw. Objs. at 7). However, the 2003 Amendments added a definition of "delivery"as distinguished from the definition of "shipping" by specifying that "deliveries shall be performed by the owner or any agent, officer, director, shareholder, or employee of the licensee" compared to performance by a third party, such as UPS, presumably qualifying as "shipping." Va. Code Ann.§§ 4.1-207(4) &(5); 208(6),(7) & (9); 209(2),(5)&(7). It is almost a legal certainty that a legislative amendment can alter the operation of unamended sections if the definitions change! Therefore, Defendants' and Wholesalers' objections to the consideration of the delivery privilege is overruled.

The Defendants next object to what they call procedural errors such as refusing to consider new evidence. The Defendants object that the Magistrate Judge failed to adopt their statement of undisputed facts, statement of genuine issues of disputed facts, and their affidavits in support of their position that the statutes in question serve the state's core concerns under the Twenty-first Amendment. On remand, the Magistrate Judge did not permit formal discovery. The Court is satisfied that this case represents a facial challenge to statutes burdening the Plaintiffs' rights to engage in interstate commerce. There is no reason to engage in formal discovery, especially given that the nature of the controversy is a facial challenge to a statute. Defendants argue that "the Court cannot conduct the *Beskind* analysis, purportedly the basis for the R. &. R., without considering the materials produced or,

in the alternative, without permitting additional discovery upon which additional findings of fact can be made." (Commw. Objs. at 8). The Magistrate Judge considered the affidavits filed by Plaintiffs, Defendants and Wholesalers but, with one exception, judged them to be irrelevant to the ultimate decision. The Defendants have cited no authority to demonstrate the error in the Magistrate Judge's decision and, finding none, the objection is overruled.

The next objection is that the Magistrate Judge failed to apply Fourth Circuit's analytical framework for addressing claims that a state's regulation of alcohol is unconstitutional. The Defendants object that the Magistrate Judge incorrectly applied the Fourth Circuit's ruling in *Beskind* in determining that Va. Code Ann. § 4.1-310(E)(i) was facially discriminatory, that there was no evidence to support a finding that it is discriminatory in effect or purpose. (Commw. Objs. at 13). In support of their objection, Defendants argue that the statute is facially neutral because it applies to *all travelers* bringing alcoholic beverages into Virginia. The Report plainly states that the interrelation of § 4.1-310(E)(i) with § 4.1-31 1(A)(1) renders the provision unconstitutional. (R. & R. at 22). The Court overrules this objection and finds that a plain reading of the statutes together demonstrate that it a consumer is limited in the amount of alcoholic beverages obtained out-of-state that he or she may transport into Virginia while a consumer is may acquire and transport an unlimited amount of alcohol within the state. The two provisions together are facially discriminatory, therefore no further evidence of effect or purpose is necessary. *Beskind*, 325 F.3d at 518.

The Defendants further argue that even if the provisions are found to be facially discriminatory, they are saved by the fact that the provisions advance a Twenty-first Amendment core concern. The Magistrate Judge could not conclude that the provisions served the core concerns of temperance, orderly market conditions and collection of revenue. The Magistrate Judge found that, other than economic protectionism,

Virginia advanced no explanation that allows consumers to purchase and transport unlimited quantities of alcohol within the state, but limits that which they can purchase and import from out-of-state. (R.& R. at 23). The Defendants argue that the Magistrate Judge found that the two-case-per-month limit on direct shipment served a core purpose and that personal transportation from out-of-state should be viewed in the same light. (Commw. Objs. at 15). While the apparent inconsistency in the Magistrate Judge's Report should be explained, the Defendants have advanced no argument nor authority that requires the Court to disregard the Magistrate Judge's decision and therefore, the objection is overruled.

The Magistrate Judge did not find "the two-case-per-month limitation on direct shipment to further core concerns of the Twenty-first Amendment." (Commw. Objs. at 15). Instead, the Magistrate Judge found that there was "no facial discrimination as there is with other provisions" and that "a rationale is lacking for why the limit of two cases rather than one, three, or whatever number was selected, the court can not categorically say that such a limit, universally applied in order to avoid any Virginia preference, does not serve to promote a legitimate core concern of the Twenty-first Amendment in promoting temperance, at least to some degree, and offering some measure of market control." (R. & R. at 24). The two-case-per-month direct shipment limitation applies equally to in-state and out-of-state sources, so no facial discrimination exists. On the other hand, the Magistrate Judge found that the statutes treat in-state delivery more favorably than out-of-state delivery, thus the discrimination against interstate delivery in favor of intrastate delivery is facially void. The Magistrate Judge found that the Plaintiffs did not adequately demonstrate, however, that the two-case-per-month limitation placed an unconstitutional burden on out-of-state interests and thus the provision remained intact.

The Defendants also object that the Report incorrectly determined that Va. Code Ann. § 4.1-119(A) violates the dor-

mant Commerce Clause. (Commw. Objs. at 15). The Report reiterated the Court's previous ruling that the statute is facially unconstitutional. The 2003 Amendments did not directly or indirectly affect the operation of § 4.1-119(A) nor has the spirit of the provision been altered. The Court's previous holding was not affected by the Fourth Circuit's ruling in *Beskind* and, therefore, has been "laid to rest." *South Atl. Ltd. P'ship of Tenn. v. Riese*, 356 F.3d 576, 584 (4th Cir. 2004). The Defendants' objection or invitation to re-litigate this issue is overruled.

The Defendants object to the Report's finding that the brand-owner control provision should be stricken because it "impermissibly encroaches upon the legislature's prerogative to further a core concern" to require brand-owner consent under Va. Code Ann. § 4.1-218. Defendants argue that the Ernestine Mack affidavit establishes that the "system of brand owner controls over importation and distribution furthers the state's interest in having a comprehensive, trackable system of regulating the shipments of alcohol into the state ... [by determining] who made the decisions to bring the alcohol here, who shipped it here, who received it, and who sold it." (Commw. Objs. at 19). The Magistrate Judge found that the state partially articulated a rationale that the system of brand-owner controls is used to further core concerns such as ensuring orderly market conditions and collecting taxes. (R. & R. at 19-20). However, when viewed in light of the other challenged provisions, the Magistrate Judge found that *Beskind* required a finding that the operation of the provisions together rendered the disparate permissions requirements as part of the "overall statutory preference for Virginia producers and purveyors" unconstitutional. (R. & R. at 28). As previously discussed, the Court finds that the Magistrate Judge's finding and conclusion is consistent with the holding in *Beskind* and therefore the objection is overruled.

Like the Plaintiffs, the Defendants object to the remedy proposed by the Magistrate Judge on the grounds that the

recommendation failed to apply Fourth Circuit law. With respect to Va. Code Ann. §§ 4.1-112.1(B) and 119(A), the Defendants argue that the Magistrate Judge failed to follow the "minimum damage" approach required by *Beskind*. (Commw. Objs. at 26-27). First, the Defendants object to the recommendation to strike § 4.1-112.1(B) in its entirety because "it goes too far." (Commw. Objs. at 27). The Defendants suggest it could be corrected by striking the last sentence of § 4.1-112.1(B), "[a]ny retail off-premises licensee that purchases wine or beer from anyone authorized to sell wine or beer at wholesale for resale in Virginia shall be presumed to have the authorization of such winery, farm winery, or brewery to ship its brands." *Id.* The Defendants provide no further explanation other than to say that striking the last sentence would correct "the purported constitutional problem." The Magistrate Judge recommended striking the entire provision, perhaps reflecting his opinion that the permissions provision is generally suspect. If the non-discriminatory portion of § 4.1-112.1(B) is justified by a core concern of the Twenty-first Amendment, which the Magistrate Judge reluctantly accepted, eliminating the last sentence that grants in-state licensees a presumption of authorization seems to eliminate the discriminatory preference. Because the "right to control distribution" is not defined in the statute but, based on the Defendants' consistent position and overall statutory in-state preference, the entire provision could operate as an in-state preference. Va. Code Ann. § 4.1-100. However, the Defendants' objection is well-taken based on the ruling in *Beskind*. Eliminating the facially invalid preference seems to eliminate the unconstitutional provision and does the least damage to the scheme. Although the Magistrate Judge's skepticism about the entire section is also well-taken because any differential treatment between the in-state and out-of-state licensees or applicants cannot be tolerated, the Defendants' objection will be sustained and the Report shall

be modified to reflect that only the final sentence of § 4.1-112.1(B) be stricken.

The Defendants also object that the Report improperly recommends striking the provision that deals with the sale of wine and beer in ABC stores "other than beer and wine not produced by farm wineries." Va. Code Ann. § 4.1-119(A). The Defendants argue that the effect of the remedy would be to permit the government stores to sell beer, which they have never done. The Defendants claim that the "proposed remedy would create chaos in the marketplace by interjecting competition between government and private entities where formerly there was none." (Commw. Objs. at 27). The statute contains a provision that expressly discriminates against out-of-state wine and beer that must be stricken as facially invalid. In their objection, Defendants merely speculate what the result might be if the ABC stores were required to stock and sell beer without asserting that the discriminatory language serves a core purpose of the Twenty-first Amendment. Therefore the Defendants' objection is overruled.

Wholesalers' Objections

The Wholesalers complain that the Magistrate Judge should not have considered claims that they have labeled "unrelated," since the Magistrate barred the parties from utilizing normal record development procedures. The Wholesalers object that "no event occurring subsequent to this Court's decision on the original complaint can justify the treatment of the unrelated claims as somehow 'related' to the original claims or the 2003 legislation. Plaintiffs have quite clearly been able to litigate a new case — with five new issues — on a record which is only barely removed from the old record." (Virginia Wine Wholesalers Assoc. Objs. to the Rep. & Recomm. of the Mag. J. at 4)(VWWA's Objs.). The Wholesalers supply approximately 28 paragraphs containing facts excerpted from the joint appendix filed in support of the motions for summary judgment and argue that the Magistrate

Judge erroneously failed to adopt and consider the supplied undisputed facts. *Id.*

The Wholesalers have not provided any authority in support of their objection that it is error to fail to adopt certain facts they assert are material. (VWWA's Objs. ¶¶ 83-107). Even though the Wholesalers have failed to cite authority requiring the Court to review and consider each purported material fact supplied by them, the Court has reviewed each paragraph and finds that the objection should be overruled on the basis that the statutes and regulations speak for themselves.

Although the Wholesalers also neglected to provide any support for the contention that the Magistrate Judge's Report exceeded the scope of the mandate on appeal, the Court will review the record in light of the Fourth Circuit's guidance. Specifically, the case was remanded "for reconsideration of plaintiffs' challenges in light of the recent statutory enactments and in light of *Beskind v. Easley*." *Bolick v. Danielson*, 330 F.3d at 277. There are two prongs of consideration set forth by the mandate: (1) to revisit Plaintiffs claims "in light of the recent statutory enactments" and (2) in light of its decision in *Beskind*. The 2003 amendments changed not only the statutory language itself, but also the way the Board operates to implement the statute. Furthermore, the Fourth Circuit applied the constitutional analytical framework under which this Court previously decided the *Bolick* case. Because the *Beskind* decision instructs that the Fourth Circuit will strike down state liquor laws that are discriminatory, the Court should ensure that it implements "both the letter and the spirit of the . . . mandate, taking into account [the Fourth Circuit's] opinion and the circumstances it embraces." *Riese*, 356 F.3d at 584. The Fourth Circuit explained that a district court may not "reconsider issues the parties failed to raise on appeal; the court must attempt to implement the spirit of the mandate; and the court may not alter rulings impliedly made by the appellate court." *Id.* (citation omitted). The Wholesal-

ers contend that the issues considered by the Magistrate Judge have been on the books, unchanged, practically since the repeal of prohibition. (VWWA's Objs. at 13-15). The Court has already explained that the 2003 Amendments defined and distinguished the meanings of the verbs "to ship" and "to deliver," altering the operation of many provisions that could otherwise be said to have remained unchanged. The issuance of a mandate requires not only application of the Court's instruction in *Beskind*, but also "the circumstances it embraces." *Riese*, 356 F.3d at 584. Given the two-fold nature of the mandate, the Court finds that there is no need to revisit the issue. Where the statutory language was expressly changed or was directly or indirectly affected by the 2003 Amendments or implementing regulations, the subject matter is fairly considered pursuant to the Fourth Circuit's decision in *Beskind* and the scope of the mandate. Therefore, the Wholesalers' objections are overruled.

The Wholesalers also argue that the Magistrate Judge instructed the parties that no discovery or other formal pretrial activity be conducted, precluding their ability to defend against the claims not raised originally or amended by the 2003 statute. (VWWA Objs. at 12). The Wholesalers' complaint about the prohibition on discovery is directly related to their complaint that the Magistrate Judge permitted the Plaintiffs to amend the Complaint to add claims that the Wholesalers argue are "entirely beyond the scope of the remanded proceedings." (VWWA Objs. at 14).

The Wholesalers have provided no persuasive authority to demonstrate error in the Magistrate Judge's decision to consider the amendments without granting leave to conduct additional discovery. The mandate rule forecloses relitigation of issues that have been decided in the court of appeals. *Riese*, 356 F.3d at 584. The Fourth Circuit expressly remanded the case for "reconsideration of plaintiffs' challenges in light of the recent statutory enactments" and *Beskind*. *Bolick*, 330 F.3d at 277. Since the institution of this

litigation, Plaintiffs' challenge has been that discriminatory features of Virginia's alcohol regulation scheme are facially unconstitutional. The Court of Appeals has instructed the Court to reconsider Plaintiffs' challenge in light of the amended statutes, which the Magistrate Judge has done. Therefore, the objection is overruled.

The Wholesalers argue that Virginia's alcohol control policies satisfy the *Beskind* minimum damage remedies test and that the R. & R. does not explain why obtaining separate permissions for out-of-state vendors violates the Constitution. (VWWA Objs. at 19). "The delivery privilege, the consumer import controls and the farm winery self-distribution privilege all exist and operate completely outside the scope of the shipper licensing legislation. No administrative relationship exists between the brand-owner permission requirement and any other challenged provision." (VWWA Objs. at 19). The Magistrate Judge found that the provision requiring out-of-state shippers to obtain a separate written consent of brand owners prior to shipping the brand to Virginia constitutes different and harsher treatment of out-of-state entities than Virginia shippers where the brand-owner consent is presumed. As already discussed, the court finds no error in the Magistrate Judge's decision. The Magistrate Judge found that Virginia articulated what could be considered a core interest to require brand-owner consent. However the discriminatory treatment was nonetheless unconstitutional because the state could impose the same brand-owner consent requirement on all shippers whether it was part of the application process or separate permissions obtained for each shipment. That the state can achieve its regulatory goals by imposing fewer burdens on in-state interests does not serve a core concern. In the final analysis, neither the Defendants nor the Wholesalers can explain that differential treatment is required to further a core concern in a permissible way under *Beskind*. The Wholesalers' objection is overruled.

The Wholesalers next argue that striking the brand-owner permissions requirement is inconsistent with *Beskind*; and that the correct remedy would be to sever the presumption of brand-owner consent that benefits in-state retail licensees seeking shipper licenses. The Magistrate Judge found that striking the brand-owner consent requirement caused the least damage to the statutory scheme and placed in-state and out-of-state entities on equal footing. There is no error in this judgment. The Wholesalers propose severing the presumption that benefits in-state licensees, which would also be acceptable under *Beskind*,. However, because there is no error in the Magistrate Judge's recommendation, the Wholesalers' objection is overruled. If the legislature imposes a brand-owner consent requirement that burdens in-state and out-of-state shippers equally, the provision may be enforceable under *Beskind*.

The Wholesalers have also lodged objections concerning the treatment of state liquor stores, arguing that Va. Code Ann. § 4.1-119(A) is neutral with respect to where beer is manufactured and therefore should not be stricken. They argue that the proposed remedy would authorize the government stores to "revert to the pre-1984 environment in which they competed with all private wine retailers in Virginia for sales of every brand of wine imported into the Commonwealth," contravening the fundamental policy of the 1984 legislation to halt the retail sale of wine in government stores.

The Wholesalers join in the same objection the Defendants lodged concerning Va. Code Ann. § 4.1-119(A), which is argued without any persuasive support. By striking the discriminatory provisions, there is no resulting requirement that the state ABC stores stock and sell any beer and wine, let alone all brands of beer and wine. However, if the Board or General Assembly chose to direct the ABC stores to sell beer and wine, they must do so on a non-discriminatory basis. The Wholesalers' objections concerning Va. Code Ann. § 4.1-119(A) are overruled.

The Wholesalers also argue that it was error to find the consumer import statute of Va. Code Ann. § 4.1-310(E) violative of the Commerce Clause. (VWWA Objs. at 23-27). First, the Wholesalers object that the R. & R. should not have addressed the consumer import statute at all because it was not amended in 2003. This objection is overruled for the reasons already discussed in relation to the Defendants' arguments that the Magistrate Judge exceeded the scope of the mandate by considering the effect of provisions that were not directly changed by the 2003 amendments. Where any provision was affected by a change, whether directly or functionally, the Magistrate Judge did not err in considering it in light of an amendment or *Beskind*.

The Magistrate Judge also found that a provision limiting the amount of alcohol a person can transport into Virginia is unconstitutional because there is no corresponding provision limiting the amount of alcohol one can purchase and transport within the state. The Magistrate Judge found, as a matter of law, that the discrimination could not serve a core concern. The Wholesalers argue that the Magistrate Judge failed to acknowledge the affidavit testimony that limitation plays an important role in tax collections and that limitations on quantity are "now federal policy" because the changes to Webb-Kenyon Act in 2002 allowed direct shipments according to state law limitations.[2] (VWWA Objs. at 24). The Wholesal-

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[2] The Wholesalers rely on § 124 of the amended Webb-Kenyon Act, which reads:

> (a) Conditions for transporting certain wine
>
> During any period in which the Federal Aviation Administration has in effect restrictions on airline passengers to ensure safety, the direct shipment of wine shall be permitted from States where wine is purchased from a winery, to another State or the District of Columbia, if- (1) the wine was purchased while the purchaser was physically present at the winery; (2) the purchaser of the wine provided the winery verification of

ers have provided no persuasive authority demonstrating that quantity import controls referenced in § 124 apply to provisions of state law that are unconstitutional. To the contrary, § 124 specifically references § 122a, of which subsection (f) provides that the state law must be valid under the Twenty-first Amendment and other constitutional provisions as interpreted by the Supreme Court of the United States. To that end, while the Supreme Court is considering the so-called direct shipment question at the time of this writing, it has not specifically ruled. The Fourth Circuit interpreted available Supreme Court precedent in *Beskind*, and it is the *Beskind* ruling on which the Magistrate Judge relied in finding that the discriminatory treatment served no core purpose. Therefore, the Wholesalers' objection is overruled.

Finally, the Wholesalers revive their complaint concerning the Magistrate Judge's reference to *Dickerson v. Bailey*, 336 F.3d 388 (5th Cir. 2003), for its holding that similar controls in Texas did not serve a core concern after allowing extensive discovery. In this case, the Court allowed no discovery, which the Wholesalers argue makes the analysis different from that in *Dickerson*. (VWWA Objs. at 25). The Court has examined the analysis in *Dickerson* and finds that the Magistrate Judge's decision was based on the language of the statute, the Fifth Circuit's reasoning, and the conclusion

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legal age to purchase alcohol;(3) the shipping container in which the wine is shipped is marked to require an adult's signature upon delivery;(4) the wine is for personal use only and not for resale; and (5) the purchaser could have carried the wine lawfully into the State or the District of Columbia to which the wine is shipped.

(b) Violations

If any person fails to meet any of the conditions under subsection (a) of this section, the attorney general of any State may bring a civil action under the same terms as those set out in section 122a of this title.

of law that the discriminatory treatment bears no relation to a core concern. This reasoning is without error of fact or law. The Wholesalers' argument is unpersuasive and is therefore overruled.

Conclusion

Even where the objection of any party has been specifically sustained and the R. & R. has been expressly modified, the objections have little or no effect on the ultimate outcome of this litigation -- the challenged portions of the Virginia scheme still facially discriminate against out-of-state wineries, breweries and retailers in favor of its in-state interests in violation of the dormant Commerce Clause. The provisions cannot be saved by any core interest the state retains in enforcement of the Twenty-first Amendment. This question may yet be answered differently by the Supreme Court of the United States. However, with the guidance and mandate of the Fourth Circuit, this case is decided in favor of the Plaintiffs on all but one claim.

An appropriate Order shall issue.

/ss/
Senior United States District Judge

Date: Apr 27 2005
Richmond, Virginia

## APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

CLINT BOLICK, et al.,

Plaintiffs,

v.

VERNON M. DANIELSON, et al.,

Defendants.

Civil Action No. 3:99CV755

**REPORT AND RECOMMENDATION OF THE MAGISTRATE JUDGE**

This matter is back before the court on remand from the court of appeals and subsequent order of reference from the district court. *Bolick v. Danielson*, 330 F.3d 274 (4th Cir. 2003); Order, June 23, 2003. In its remand, the court of appeals instructed the district court to reconsider the matter in light of statutory changes that had occurred while the case was on appeal and to do so in light of its decision in *Beskind v. Easley*, 325 F.3d 506 (4th C. 2003), a case involving common issues that was decided after the initial appeal in this case. In its order of reference to this court, the district court defined the issues for consideration as follows:

(I) Given recent Virginia legislative enactments, whether there is any Virginia preference remaining in the state statutory scheme for the shipment and/or sale of wine and/or beer;

(2) If there is such a preference, whether the preference is violative of any constitutional proscription; and

(3) If so, what relief is warranted consistent with the dictates of *Beskind v. Easley*.

In its present posture, the case involves a constitutional challenge to the Virginia alcohol regulatory scheme whereby Virginia producers, retailers, and consumers of wine and beer are afforded various benefits (preferences) in the manufacture, shipment, and delivery of wine and beer not provided to out-of-state sources.[1] Ultimately, the issue is whether such "preferences" constitute unconstitutional infringement of free trade among the states that cannot be justified or otherwise excused by the provisions of the Twenty-first Amendment or other controlling authority.

The individual Plaintiffs, both present and proposed, are consumers of wine and beer, while the present and/or prospective Plaintiff business entities are either out-of-state growers and producers of wine (Dry Comal Creek Winery and Hood River Vineyards) or an out-of-state wine and beer retailer (Schneider Liquor Company). (Pls.' Am. Mem. of P. & A., Separate Statement of Undisputed Material Facts, Filed in Supp. of Mot. Summ. J. or Alt. Partial Summ. J. or Alt. Decl. Relief at 7-8)(PIs.' Mem.). Although each business entity is licensed to conduct business in its respective jurisdiction, none of them nor any named individual is licensed to conduct any activity in Virginia involving the importation, distribution, or sale of alcoholic beverages. (Pl.'s Mem. at 7-8).[2] The Defendants are all appointed members of the Virginia Alcoholic Beverage Control Board (ABC Board) who

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[1] Previously, the central issue in the case concerned the state's prohibition of any out-of-state direct shipments of wine or beer to Virginia consumers while permitting Virginia sources to do so. Although the recent legislative amendments have modified the prohibition, the nature and extent of the modification remains an issue.

[2] Accordingly, the Defendants challenge the Plaintiffs' standing to assert at least some of the claims. (Corrected Commw.'s Br. Supp. of Mot. Summ. J. & Opp'n to Pls.' Mot. Summ. J. at 10-12)(Defs.' Corrected Br. Summ. J.).

are sued in their official capacities as proper parties defendant, the current individual Board members being substituted for their predecessors during the pendency of the litigation. Va. Code Ann. §§ 4.1-102-103; *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658 (1978). The Intenvenor,[3] the Virginia Wine Wholesalers Association, is a trade association representing the interests of Virginia wine wholesalers.

**Recent Procedural History**

In a series of related orders intended to expedite an already prolonged process, this court, while remaining mindful of the direction from above, granted leave for the Plaintiffs to file a supplemental complaint and for each party to submit cross motions for dispositive relief. (Orders, Oct. 3, 2003; Jan. 14, 2004; and Feb. 3, 2004). The court also reserved for consideration, until it had the benefit of full briefing and argument on all issues, the question of whether the Plaintiffs had pled different, unrelated claims that would exceed the mandate on remand. (Order, Feb. 3, 2004).[4] The court also stayed all discovery pending resolution of the anticipated motions for dispositive relief because of the strictures of the appellate court's mandate, the fact that the evidentiary record had already been closed in the prior proceeding, and because the issues on summary judgment involving a facial challenge to the statutory scheme do not necessitate an evidentiary ba-

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[3] For purposes of simplicity, the Defendants and the Intervenor will be referred to collectively as the Defendants unless otherwise specified.

[4] The court had initially delayed entering a scheduling order until it was satisfied that no material changes were likely to be made in the implementing regulations that were not to become effective for several months following a comment period; or, if there were any, that any change(s) could still be addressed before final resolution at the district court level. (Order, Oct. 3, 2003).

sis beyond what may be presented by affidavit pursuant to Fed. R. Civ. P. 56. (Orders, Oct. 3, 2003; Feb. 3, 2003).[5]

**Evidentiary Objections**

The Defendants object to consideration of the Plaintiffs' Supplemental Complaint and move to strike the affidavits that have been submitted in support of Plaintiffs' Motion for Summary Judgment because they argue that the affidavits are inadmissible under the Federal Rules of Evidence for various reasons. (Commw.'s Mem. In Supp. of Objs.& Mot. Strike at 1-3, 14)(Defs.' Mot. Strike). Defendants also object that the proposed Supplemental Complaint exceeds the scope of the mandate on remand and that certain of the affidavits supplied by the Plaintiffs in support of the claims in the new complaint are, among other things, irrelevant, immaterial, constitute hearsay, contain improper expert testimony, and/or are not properly authenticated. (Defs.' Mot. Strike *passim*). The Plaintiffs likewise object to consideration of any of the affidavit evidence offered by the Defendants in support of their request for dispositive relief for various reasons, including the assertion that legal conclusions are being impermissibly advanced as expert opinion; that such permissible expert opinion as may be offered was not disclosed in advance as

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[5] The court also instructed the Defendants not to file an answer to the Supplemental Complaint because of the pending motion to add and delete parties Plaintiff, the court having reserved proposed resolution of that motion pending full consideration of the dispositive motions which would address the issue of whether new parties had to be joined to assert valid claims or existing parties were to be deleted where their claims had been rendered moot by the legislative developments. As such, the court did not deem it appropriate or necessary to require a pro forma answer until, at least, all viable claims had been identified, the court presuming correctly that the parties would address the issues involving any alleged new or existing claims and new or existing parties plaintiff in their respective motions and supporting memoranda seeking dispositive relief.

required; that one or more of the affiants are not properly qualified as experts and are not able to offer the opinion(s) they do as lay witnesses; and that the information presented is irrelevant to the issues under consideration in any event. (Pls.' Mot. Strike Second Supp'l Aff. Curtis W. Colburn, III, filed Supp. of Defs.' Reply to Pls.' Mot. Summ. J.).

Under Fed. R. Civ. P. 56, a party is entitled to submit evidence by affidavit in support of its motion for summary judgment as long as the affidavit sets forth facts within the knowledge of the affiant that would otherwise be admissible. Other admissible evidence such as documents may also be submitted in support of a motion for summary judgment. The court has considered the motions to strike and the admissibility of all subject affidavits. Other than their relevancy in establishing that each proposed Plaintiff has an identifiable interest in a "case of real consequence to the parties" and that their respective interests are so intertwined as to confer standing, the material is essentially irrelevant to the facial challenge involved. Nevertheless, the court recommends denying the Defendant's motion to strike as moot where the court does not rely on the challenged material in making any recommendation.[6]

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[6] In addition, the court deems it unnecessary to rule with particularity on each and every objection raised in either the Plaintiffs' or the Defendants' motions to strike for while there is objectionable material that can be found in several of the affidavits presented, it is sufficient, if not preferable, for purposes of a complete record to admit the material as long as it is viewed "through the lense of Fed. R. Civ. P. 56," rather than to redact material or, in some instances, strike the challenged evidence entirely. *Brown v. Angelone*, No. Civ. A. 01-144-AM, 2002 WL 32502353, at *10 (E.D. Va. M. 28, 2002). Moreover, for the most part, the evidence presented is within the personal knowledge of the affiants or is otherwise competent, aside from the basic fact that striking the evidence is unnecessary because the court's recommendation to substantially grant Plaintiffs' Motion for Summary Judgment does not rest

The material offered by the Defendants is likewise unavailing, with the sole exception of a single unrefuted affidavit that provides a basis to consider whether a particular provision requiring producer consent for an out-of-state source to ship its product (Va. Code Ann. § 4.01-112.1) serves a core concern of the Twenty-first Amendment, thereby allowing it to survive constitutional challenge. (Supp'l Aff. Ernestine Mack attached as ex. 49 to Defs.' J.A.). Nevertheless, the court also recommends denying Plaintiffs' motion to strike for the same ultimate reason urged for denying the Defendants' motion, namely, that the challenged material does not form the basis for any of the court's recommendations.[7]

**Standard of Review**

The standard for review remains the same on remand as it did in the original action. Summary judgment is to be granted only if there is no genuine issue as to any material fact when the evidence and all justifiable inferences are viewed in the light most favorable to the non-moving party and the moving party is entitled to relief as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986); *Anderson v. Liberty Lobby. Inc.*, 477 U.S. 242, 251 (1986). The court must under-

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on the challenged material. *El v. Tek Sys. Inc.*, 311 F. Supp. 2d 516, 518 (E.D. Va. Sept. 24, 2002); *Jordan v. Western Dist. Co.*, No. Civ. CCB-03-950, 2004 WL 1465804, at *2, n.3 (D. Md. June 25, 2004).

[7] The court originally allowed extended discovery to provide the opportunity for the parties to explore such potentially relevant issues as whether there were less restrictive means to achieve legitimate state interests pursuant to the authority the state retains under the Twenty-first Amendment. The court was sorely mistaken that the discovery process would produce such relevant evidence, but perhaps it is because the state could not justify its creation of in-state preferences on other than purely protectionist bases while denying out-of-state interests the same benefits.

take a "dual inquiry into the genuineness and materiality of any purported factual issues." *Ross v. Communications Satellite Corp.*, 759 F.2d 355, 364 (4th Cir. 1985). "Genuineness means that the evidence must create fair doubt; wholly speculative assertions will not publicly suffice." *Id.* "Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, disposition by summary judgment is appropriate." *Teamsters Joint Council No. 83 v. Centra, Inc.*, 947 F. 2d 115, 119 (4th Cir. 1990). It is not the court's role to weigh the evidence, but instead to decide whether there exists a genuine issue for trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. at 249. In addition, where there is federal jurisdiction, declaratory judgment relief pursuant to Fed. R. Civ. P. 57 and 28 U.S.C. § 2201 is appropriate to resolve the legal rights of the parties *if* there is no dispute as to material facts. *Columbia Gas Transmiss'n Corp. v. Drain*, 237 F.3d 366, 370 (4th Cir. 2001).

**Undisputed Material Facts and Statutory Predicates**[8]

The court finds the following undisputed material facts to be relevant in this facial challenge, but only to the extent, as noted by the district court in its earlier opinion, for "placing the nature of the parties' dispute in proper context." *Bolick v. Roberts*, 199 F. Supp. 2d 397, 402 (ED. Va. 2002). The court also includes a summary of relevant statutory provisions, including those that were the subject of the recent amendments, that although not factual in nature, form part of the necessary predicate for this analysis. The court bases its findings on facts adopted by the district court in the initial stage of the litigation (which are repeated here for ease of reference and review), a review of the parties' submissions in support of their respective motions for dispositive relief (including their respective assertions of undisputed facts as required by local

[8] Hereinafter "Findings."

rule), and the court's own review of the relevant regulatory scheme:[9]

1. State liquor control of wine, beer, and distilled spirits (alcoholic beverages) in Virginia is authorized by the Virginia ABC Act and by regulations promulgated by the ABC Board (Board). Va. Code Ann. §§ 4.1-100 - 516. The Board was created to be the agency with "the exclusive power to issue all state licenses for the manufacture, sale and distribution of alcoholic beverages in this State, and should be given broad authority to refuse, grant or revoke such licenses." (*Liquor Control* (Jan. 1934), Sen. Doc. 5 at 8).

2. An entity seeking to manufacture alcohol in Virginia must be sited within the state and it "must meet stringent corporate bookkeeping and management guidelines." *Bolick*, 199 F. Supp. 2d at 403.

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[9] Many, if not most, of the facts asserted by each party as undisputed were addressed in the court's earlier report and recommendation and resolved by the district court. Nevertheless, the parties have urged upon the court innumerable, additional assertions that they claim to be both undisputed and relevant to the resolution of the pending issues. In fact, many of the assertions urged were either rejected by the district court earlier, are not relevant to a facial constitutional challenge, or are clearly disputed. For example, the parties are at odds over whether the so-called two case-per-month limitation unduly burdens out-of-state wine shippers so as to be constitutionally violative because the product is susceptible to damage in shipment without expensive preventive measures being taken under certain weather conditions. (Int./Def. VWWA's Reply Br. Mot. Summ. J. (Int. Reply Br.) at 12-13). The issue is disputed and therefore not subject to resolution on summary judgment in any event. At the same time, it is not necessary to resolve the issue because it is recommended that dispositive relief should be granted on other grounds.

3. A winery is a manufacturer that makes wine primarily from it grown off-site or out-of-state, whereas a Virginia farm winery uses 51% to 75% of it grown on site or within Virginia to produce its product. Va. Code. Ann. § 4.1-219; Va. Admin. Code § 5-60-50(3).

4. A licensed Virginia winery, farm winery, and brewery may manufacture its respective product on site, sell it in unlimited quantities on site, and deliver the product in unlimited quantities to consumers if it uses its own mode of transportation. *Id.*; Va. Code Ann. §§ 4.1-207(4)(5); 208(6)(7)(8); 209(2)(5)(7); 310(B)(D).

5. A licensed Virginia farm winery may produce, sell, and ship an unlimited amount of its product to Virginia retailers whereas an out-of-state winery may not sell, ship, or deliver any of its product directly to a Virginia retailer; rather, it must ship only to Virginia licensed wholesalers or directly to an individual consumer if it has a Virginia shipper's license and then at the rate of no more than two cases per month. Va. Code Ann. §§ 4.01-207(5)(ii); 212.1; 310(B)(D).

6. An in-state or out-of-state winery, brewery, or retailer must have a shipper's license that is subject to renewal on a periodic basis for the sale and shipment of alcoholic products into and within Virginia and the licensed shipper can only ship to a person who is legally entitled to purchase and receive for personal consumption no more than two cases of wine or two cases of beer per month. Va. Code Ann. § 4.1-112.1(A).

7. An applicant for a shipper's license who purchases wine or beer from other than a Virginia licensed wholesaler must obtain and file with its application for a shipper's license confirmation that the out-of-state producer consents to the applicant's sale and

shipment of each type of its product. Va. Code Mn. § 4.1-112.1(B).

8. An applicant for a shipper's license that purchases wine or beer from a Virginia licensed wholesaler does not have to have the specific authorization of the producer entity who markets its product through the wholesaler for resale in order to obtain a shipper's license. *Id.*

9. A Virginia wholesaler can only sell wine or beer to a retailer within a specified geographical area, and the wholesaler must have the express authorization of the producer to market its product. Va. Code Ann. §§ 4.1-218, 404, 503.

10. A Virginia consumer may purchase for personal consumption and transport unlimited quantities of wine and beer within Virginia. Va. Code Ann. § 4.1-311(A)(l); Va. Admin. Code § 5-70-10(A)(1).

11. A person may bring into Virginia in his personal possession for personal consumption no more than one gallon or four liters of alcoholic beverage; or a "reasonable quantity," not for resale, if relocating one's residency to Virginia. *Id.*

12. All in-state and out-of-state farm wineries, wineries, breweries, and retailers who are licensed to ship wine and/or beer are permitted to ship only two cases of wine per month and two cases of beer per month to each Virginia consumer who must be legally authorized to receive the product. Va. Code Ann. § 4.1-112.1(A).

13. With rare exception that does not impact any issue here, the ABC system is the only entity in Virginia authorized to acquire, store, distribute, and sell distilled spirits. Va. Code Ann. § 4.1-310.

14. The ABC system operates its own off-premises liquor stores for sales to the general public, and it also distributes to on-premises licensees such as bars and restaurants. *Id.*

15. Virginia law requires that state liquor stores (ABC stores) only market and sell wine produced by Virginia farm wineries. Va. Code Ann. § 4.1-119(A).

16. ABC stores do not market or sell any beer, including Virginia produced beer. *Id.*

**Issues Presented**

The court deems the pertinent issues to be resolved as follows:[10]

1. Whether the provision of state law that permits in-state retailers of wine and beer to sell and ship to Virginia consumers without first obtaining written permission from the respective producer to market its product while requiring out-of-state retailers to do so in support of an application for a shipper's license as required for retailers to conduct such business in Virginia is constitutionally flawed.

2. Whether the provision of state law that permits in-state farm wineries to manufacture, sell, ship, and deliver unlimited amounts of Virginia-produced wine to retailers while prohibiting out-of-state wineries from doing so is constitutionally flawed.

3. Whether the provision of state law that permits in-state wineries and breweries to sell and deliver unlim-

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[10] As propounded in essence by Plaintiffs and agreed to by the Defendants at oral argument, subject to their objections as to the standing of Plaintiffs to assert certain claims and a determination of whether particular issues are otherwise properly before the court for its consideration. (Pls.' Mem. at 2).

ited amounts of wine or beer to purchasers if they use their own mode of transportation and delivery while prohibiting all out-of-state sources from doing so is constitutionally flawed.

4. Whether the provision of state law that prohibit Virginia consumers from personally transporting wine and beer of more than a certain quantity into Virginia, while permitting the transportation for personal consumption of unlimited amounts within the state, is constitutionally flawed.

5. Whether the provision of state law that restricts both in-state and out-of-state wineries and retailers who have shipper's licenses from selling and shipping any more than two cases of wine and beer each month to individual Virginia consumers is constitutionally flawed.

6. Whether the provision of state law that requires ABC stores to market and sell only Virginia-produced wine is constitutionally flawed.[11]

**Analysis**

Since this court's earlier report and recommendation, the United States Court of Appeals for the Fourth Circuit rendered its comprehensive opinion in *Beskind v. Easley*[12] in

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[11] The court has listed the issues in this sequential order only to address them in what is deemed logical progression for analysis without any other significance being intended.

[12] Other courts of appeals have also issued relevant opinions, but this court is bound by the controlling authority of this circuit. *See Bridenbauah v. Freeman-Wilson*, 227 F.3d 848 (7th Cir. 2000); *Bainbridge v. Turner*, 311 F.3d 1104 (11th Cir. 2002); *Dickerson v. Bailey*, 336 F.3d 388 (5th Cir. 2003); *Heald v. Engler*, 342 F.3d 517 (6th Cir. 2003); *Swedenburg v. Kelly*, 358 F.3d 223 (2nd Cir. 2004). In addition, although the Supreme Court has granted writs of certiorari in two of the cases and consolidated them for argu-

which it thoroughly examined the issues in a constitutional challenge to North Carolina's regulatory scheme comparable to that at issue here. 325 F.3d at 512. As part of its analysis, the court in *Beskind* reviewed the pertinent history involving the Commerce Clause, including the impact of the Twenty-first Amendment, so that any further discussion of the historical perspective of the dispute beyond that already set forth by this court in its earlier report and, more importantly, as pronounced in *Beskind*, is unnecessary. 325 F.3d at 512-13. The essence of the question presented here is the same as the court articulated in *Beskind*:

> [W]ithin the authority to regulate alcoholic beverages conferred on the States by the Twenty-first Amendment, some power to regulate interstate commerce was withdrawn from Congress so that the Commerce Clause could not be construed to prevent the enforcement of State laws regulating the importation of alcoholic beverages and the manufacture and consumption of alcoholic beverages within State borders. *See, e.g., Ziffrin, Inc. v. Reeves*, 308 U.S. 132, 138, 60 S.Ct. 163, 84 L.Ed. 128 (1939) ("the Twenty-first Amendment sanctions the right of a State to legislate concerning intoxicating liquors brought from without, unfettered by the Commerce

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ment during the next term of Court (*Heald* and *Swedenbur*), the sole issue for consideration in those cases is whether a state's prohibition (or, presumably, any limitation as is at issue here) on direct shipment sales from out-of-state violates the dormant commerce clause in light of the Twenty-first Amendment. *Swedenburg v. Kelly*, 124 S.Ct. 2391 (U.S. 2004). It is not appropriate to await the Supreme Court's decision in those cases because, although potentially dispositive as to the direct shipment issue, there are additional issues peculiar to the constitutionality of Virginia's scheme involved here. For this reason, the court recommends that the Defendants' (Commonwealth's) Motion to Stay All Proceedings (docket entry no. 261) be denied.

> Clause"). The core interests protected by the Twenty-first Amendment are described as the States' interests in "promoting temperance, ensuring orderly market conditions, and raising revenue," all in connection with the manufacture, shipment, and use of alcoholic beverages. *North Dakota v. United States*, 495 U.S. 423, 432, 110 S.Ct. 1986, 109 L.Ed.2d 420 (1990) (plurality opinion). But beyond the core interests protected by the Twenty-first Amendment, Congress remains empowered to regulate interstate commerce under the Commerce Clause. *See Bacchus Imports*, 468 U.S. at 275, 104 S.Ct. 3049 ("It is by now clear that the Amendment did not entirely remove state regulation of alcoholic beverages from the ambit of the Commerce Clause"). The question in this case thus becomes "'whether the interests implicated by a state regulation are so closely related to the powers reserved by the Twenty-first Amendment that the regulation may prevail, notwithstanding that its requirements directly conflict with express federal policies.'" *Id.* at 275-76, 104 S.Ct. 3049 (quoting *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 714, 104 S.Ct. 2694, 81 L.Ed.2d 580 (1984)).
>
> *Id.* at 513.

*Beskind* also confirms the analytical approach that must be utilized:

> Under the analytical framework designed by the Supreme Court to answer this question, we determine first whether the purported State regulation violates the Commerce Clause without consideration of the Twenty-first Amendment. If we conclude that it does, then we look at the State's Twenty-first Amendment interests and determine "whether the principles underlying the Twenty-first Amendment

> are sufficiently implicated by the [State regulation] ... to outweigh the Commerce Clause principles that would otherwise be offended." *Bacchus Imports*, 468 U.S. at 275, 104 S.Ct. 3049; see also *Healy v. Beer Inst.*, 491 U.S. 324, 109 S.Ct. 2491, 105 L.Ed.2d 275 (1989); *Brown-Forman Distillers Corp. v. New York State Liquor Auth.*, 476 U.S. 573, 106 S.Ct. 2080, 90 L.Ed.2d 552 (1986); *TFWS, Inc. v. Schaefer*, 242 F.3d 198, 212 (4th Cir. 2001). The Eleventh Circuit, applying this analytical framework in *Bainbridge v. Turner*, 31 1 F.3d 1104, 1112 (11th Cir. 2002), a case challenging Florida's direct-shipment laws, summarized the approach:
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> All components of the dormant Commerce Clause doctrine remain in force unless a "core concern" of the Twenty-first Amendment is implicated. When such a concern is implicated, the Amendment removes the constitutional cloud from the challenged law so long as the state demonstrates that it genuinely needs the law to effectuate its proffered core concern. In no event can the law directly regulate extraterritorially; nor can a law ever be motivated by "mere economic protectionism."
>
> *Id.* at 513-14.[13]

*Beskind* resolves — at least for the time being — certain basic principles that are relevant to the resolution of each issue here. First, *Beskind* recognizes the affirmative authority of the Commerce Clause "to regulate commerce [carrying]

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[13] Although the Defendants strenuously object to the court of appeals' adoption of the two-step approach because it supposedly dilutes the impact of the authority delegated to the states by the Twenty-first Amendment, they necessarily acknowledge that it is the controlling procedure in this circuit, at this time. (Defs.' Br. at 5, n.3)(citing *Swedenburg v. Kelly*, 358 F. 3d 223 (2d Cir. 2004)).

with it an implied 'dormant' aspect that restricts the power of the States to burden interstate commerce." 325 F.3d at 514. Moreover:

> [t]he Commerce Clause does more than confer power on the Federal Government; it is also a substantive restriction on permissible state regulation of interstate commerce. The Commerce Clause has long been recognized as a self-executing limitation on the power of the States to enact laws imposing substantial burden on such commerce ... [a]nd a law that discriminates against interstate commerce is the clearest example of the type of state law that imposes an unconstitutional burden on that commerce.

*Id.* (citing cases, including *Brown-Forman Distillers Corp. v. New York State Liquor Auth.*, 476 U.S. 573, 579 (1986)(emphasis added)("when a state statute . . . discriminates against interstate commerce, *or when its effect is to favor in-state economic interests over out-of-state interests*, we have generally struck down the statute without further inquiry").

*Beskind* also holds that, within the ambit of the Commerce Clause, discrimination prohibited by the "dormant" Commerce Clause "means simply 'differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter.'" *Id.* (citing cases). *If* a facial examination reveals such discrimination, the *Beskind* court also held that such a scheme violates "a central tenet of the Commerce Clause" so that the "virtually *per se* rule of invalidity provides the proper legal standard ... [and the discriminatory scheme] must be invalidated unless [the State] can 'sho[w] that it advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives.'" *Id.* at 515 (quoting cases). If the State cannot justify its preference for in-state activity, its actions "cannot credibly be portrayed as anything other than local economic

boosterism in the guise of a law aimed at alcoholic beverage control." *Id.* Such a statutory scheme cannot withstand constitutional scrutiny.

It is against this backdrop that the court addresses the designated issues.

**Required Permission of Producers for Obtaining Out-of-State Shipper's License**

One of the recent statutory amendments provides that an out-of-state retailer must obtain the written permission of the manufacturer (producer) of each brand of wine or beer it intends to ship into Virginia in order to apply for a shipper's license that is required for such commercial activity. Va. Code Ann. § 4.1-112.1(B). However, an in-state retailer does not have to obtain such permission if the retailer purchases wine or beer from a Virginia-licensed wholesaler. *Id.* The Plaintiffs charge that such facial discrimination places an undue burden on the out-of-state retailer who has to "run around" to obtain and file such permission. (Pls.' Mem. at 23-24). They also argue that the Virginia preference involved is not justified by the Defendants' argument that it can fairly be assumed that the producer consents to the in-state retailer's access to its product where the producer has consented to sell its product to a licensed Virginia wholesaler because of the exclusive territorial provisions of the law that prohibit wholesalers from selling to retailers outside a prescribed area. *Id.* (citing Va. Code Ann. §§ 4.1-404, 503). Specifically, Plaintiffs assert that such exclusivity requirements signify that out-of-state producers "have strong and legally enforceable preferences about who can market their products in various part of the state" so that Defendants' "implied consent" rationale fails where it cannot be assumed that any retailer has the producer's implied consent to market its product as long as it was obtained through a Virginia wholesaler. *Id.* Plaintiffs also assert that even if the need for such individual producer consent could be justified as a core

concern, less discriminatory means are available to avoid differential treatment such that the provision remains violative of the Commerce Clause. *Id.* at 24.

The Defendants initially respond that none of the Plaintiffs have the requisite standing "to bring the challenge related to the restrictions on shipping or the restrictions on delivery" because none of them have shipper's licenses and that separate permission from the out-of-state producer is not required in any event for sale by a Virginia wholesaler to a Virginia retailer because the producer obviously consented to the sale to the Virginia wholesaler with the expectation that the product would be resold to a Virginia retailer. (Defs.' Mem. at 12-14, 17-19). Accordingly, duplicate consent is not required, the Defendants argue, and the provision is otherwise necessary to insure that the same brand-owner control is exercised as it is with regard to Virginia wholesalers ("to know who made the decisions to bring the alcohol here, who shipped it here, who received it, and who sold it"). *Id.* at 18.

*Standing*

The district court has previously addressed and rejected similar standing arguments by the Defendants, holding, in effect, that named plaintiffs had standing to assert a facial constitutional challenge without having to first place themselves in jeopardy by violating the law prohibiting the relief they were seeking or by having to perform a useless act such as applying for a permit that would certainly be denied. *Bolick*, 199 F. Supp. 2d at 418; (Order, Feb. 7, 2000). Whether the issue is one of standing or "ripeness,"[14] this court recommends reaffirmation of the basic principle that a litigant

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[14] As noted by Plaintiffs, the issue may be more properly addressed in terms of ripeness where the essential focus is on the timing of the challenge — ot whether these particular parties have a sufficient interest to protect. *Id.* at 8, n.5, 10 (citing authority). In any event, the result is the same.

should not be made to engage in a futile act to make a facial challenge to a controlling authority as long as the party has an identifiable interest in a "case of real consequence to the parties." *Triple G. Landfills, Inc. v. Bd. of Comm'rs*, 977 F.2d 287 (7th Cir. 1992); Pls.' Mem. at 9-12 (citing authority, including this circuit). In addition, a party has standing to address the interests of third parties *if*, as here, their interests are so intertwined they are inseparable. *Singleton v. Wulff*, 428 U.S. 106 (1976) ("the enjoyment of the right is inextricably bound up with the activity the litigant wishes to pursue"). Surely, the interests of all levels in the manufacturing and distribution system at issue here, from producer to consumer, are so intertwined that it affords both present and proposed plaintiffs standing to assert a facial challenge to those particular aspects of the statutory scheme that impact them directly or, by necessity, indirectly.

*Constitutional Issue(s)*

As previously noted, the essential inquiry is whether a challenged provision violates the Conunerce Clause in the basic sense of whether a so-called Virginia preference for in-state interests cannot be justified by core concerns of the Twenty-first Amendment. *Beskind* at 513-14. Under the statutory scheme in question, an out-of-state retailer must obtain the written permission of the manufacturer/producer for each brand of wine or beer that it wishes to ship into Virginia in order to obtain a shipper's license that is required for such commercial activity for a stated period of time, subject to periodic renewal. (Findings ¶¶ 6-7). At the same time, any retailer who purchases from a Virginia wholesaler does not have to obtain such prior consent. (Findings ¶ 8). The Defendants contend that such "brand-owner control" is necessary in order for the "state to know who made the decisions to bring the alcohol here, who shipped it here, who received it, and who sold it." (Defs.' Mem. at 18, citing affidavit evidence). They argue that such a distinction is justified in order to insure that all brand owners have control over the market-

ing of their product as they do in regard to any purchase from a Virginia wholesaler by a Virginia retailer. (Defs.' Mem. at 17-18). Moreover, the Defendants assert that Virginia retailers should not have to obtain such specific consent because it can be presumed that the Virginia wholesaler already has the authorization of the producer that has to know that the product is going to be marketed to a Virginia retailer. *Id.*

The provision obviously treats one commercial group differently than another, namely, those distributors that do not purchase from Virginia wholesalers and the Virginia retailers that do. Such a statutory scheme presumptively violates the Commerce Clause. The remaining issue, therefore, is whether such a preference can be justified by the state's interest in protecting a "core concern" that cannot be adequately addressed by less discriminatory means.

This court has previously analyzed the concept of "core concerns" vis-a-vis the Twenty-first Amendment in its earlier report in this same case such that repetition is not necessary. *Bolick*, 199 F. Supp. 2d at 433-34. Suffice it to say, as *Beskind* notes, "[t]he core interests protected by the Twenty-first Amendment are described as the States' interests in 'promoting temperance, ensuring orderly market conditions, and raising revenue,' all in connection with the manufacture, shipment, and use of alcoholic beverages." *Beskind* at 513 (citing *North Dakota v. United States*, 495 U.S. 423, 432 (1990)). Here, the Defendants assert, based on unrefuted affidavit evidence, that the requirement for obtaining the producer's consent (brand owner), which includes identification of all authorized distributors and their designated territories, allows the state to, in effect, ensure "orderly market conditions, and raise] revenues":

> Based on these and related recordkeeping requirements, the Department's Enforcement Division, of which the Tax Management Section is a part, can then verify the origin of wine shipments, the desti-

> nation of such shipments, whether the shipments were received, total liters of wine remaining in the distributor's inventory, total liters sold by the distributor in a taxable or tax exempt transaction and the amount of wine excise tax that should have been paid. Although beer distributors do not send copies of their purchase orders to the Department, they are required to keep the same records as wine distributors and file monthly malt beverage excise tax reports and so the Department is able through audits to make the same verification as to whether the proper amount of beer excise tax has been paid.

(Supp'l Aff. Ernestine Mack, ¶ 11 and attachments, ex. 49 of Defs.' J.A.).

The Defendants maintain that such "brand owner system of controls" allows the state to more effectively track "what [has] been shipped into Virginia and to whom" and that the mechanism is necessary to insure, among other things, that the appropriate excise tax is paid since no extraterritorial means are available to insure that other states maintain such primary source requirements. *Id.*, ¶¶ 12, 15.

Plaintiffs retort that the Defendants have misconstrued the regulatory scheme involved. (Pls.' Mem. P. & A. Opp'n Defs.' Mot. Summ. J. (Pls.' Opp'n Br.) at 17-18). First, Plaintiffs argue that Defendants' assertion that the presumed consent of producers to any in-state sale from a Virginia wholesaler to a retailer can be withdrawn by the producer so as to place the out-of-state retailer (who must obtain such separate consent that can be withheld or cancelled) on the same footing as the in-state retailer "is not accurate." *Id.* Specifically, Plaintiffs cite relevant statutory language that only permits withdrawal of producer consent that had been initially granted in support of an application for a shipper's license that the in-state retailer who purchases from a licensed Virginia wholesaler does not have to possess. *Id.* Moreover,

Plaintiffs argue, the requirement for producer consent that, in isolation, would permit statewide sales runs counter to that feature of the regulatory scheme that imposes territorial exclusivity restrictions that necessary belie the state's insistence (if not also the producers') for strict market control. *Id.* at 18; Findings ¶ 9.

Aside from the Plaintiffs' arguments, the court does not understand, as a practical matter for effective enforcement, that an out-of-state distributor, that *already* holds a shipper's license previously issued on the basis of an application disclosing the consent of some brand owners, must first obtain any additional consents to ship to the individual Virginia consumer as permitted by the two-case-per-month provision. Such a regulatory gap, if true, may provide the basis for challenging the Defendants' protestations that it is necessary for the out-of-state distributor to obtain consent in order to maintain a "brand owner system of controls." At the very least, assuming the statutory scheme contemplates full brand owner consent in advance of each shipment, such a requirement presumably saddles the out-of-state shipper — as asserted by the Plaintiffs — with a greater practical burden than its in-state counterpart by it having to potentially "run around" to obtain multiple producer consents for individual shipments.

Nevertheless, although the court has serious doubts as to the effectiveness of the brand owner consent requirement for substantially improving the state's "ability to monitor [the] importation, distribution and sale of wine and beer," touted by the Defendants as the rationale for the commercial distinction involved, the court cannot say, even in light of Plaintiffs' arguments, that the requirement does not address — at least partially — a "core concern" of the state to ensure orderly market conditions as sanctioned by the Twenty-first Amendment. Further, although requiring in-state distributors to also obtain separate consent may eliminate the discriminatory impact by compelling all distributors, both out-of-state and in-state, to endure the same commercial burdens, the un-

refuted affidavit evidence presented in support of the provision demonstrates that such a requirement for in-state distributors would be a redundant and thereby essentially useless act. The court does not believe that the performance of a useless act would constitute a "reasonable," non-discriminatory alternative sufficient to override the impact of the Twenty-first Amendment. For these reasons, the court concludes that the provision, *when viewed in isolation*, withstands constitutional scrutiny. However, the remaining issue, given the dictates of *Beskind*, is whether it can survive when viewed in combination with the other challenged provisions:[15]

> The unconstitutional discrimination that [Plaintiffs] alleged was not created only by the laws prohibiting the direct shipment of wine but rather by the *combination* of the prohibition of direct shipment and the law permitting local wineries to circumvent this prohibition. And we have not determined that the ban on out-of-state direct shipping *alone* violates the Commerce Clause; nor have we determined that the authorization for in-state direct shipping *alone* violates the Commerce Clause. Rather, we have determined that the conjunctive effect of these two statutes in producing discrimination burdening out-of-state wineries and benefitting in-state wineries violates the Commerce Clause. *Beskind*, at 518 (citing *West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186(1994) ("By conjoining a tax and a subsidy, Massachusetts has created a program more dangerous to interstate commerce than either part alone". . . . Thus, in reviewing the remedy, we are given . . . the choice to affirm the district court's conclusion that the out-of-state direct shipment prohibition should be stricken and its enforcement enjoined or

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[15] A determination made later herein.

to agree with the State that only the provision affording the preference for local wineries should be stricken and enjoined)).

325 F.3d at 518.

**Unlimited Shipment By In-State Farm Wineries To Retailers**

The statutory amendments include a provision that allows licensed Virginia farm wineries to manufacture, sell, ship, and deliver unlimited amounts of product to retailers while prohibiting out-of-state sources from doing so. (Findings ¶ 5). Obviously, the provision creates a commercial distinction that smacks of simple protectionism and is therefore presumptively violative of the Commerce Clause. Although it tries, the state cannot seriously argue that such a clear commercial advantage for the Virginia farm winery addresses any core concern of the Twenty-first Amendment when it eliminates any restriction on the volume of "such an inherently dangerous substance" that can be sold through retail outlets. (Br. Supp. Mot. Summ. J. & Opp'n Pls.' Mot. Summ. J. (Defs.' Mem) at 37). Furthermore, the fact that Virginia farm wineries and retailers are licensed and, as urged by the Defendants throughout this litigation, subject to strict oversight, does not afford any orderly control over market conditions or address any other core concern of the Twenty-first Amendment if volume is unrestricted. Even if a legitimate purpose could be perceived, there is no reasonable explanation why the same restriction should not be applied to Virginia farm wineries to eliminate the inherent commercial discrimination involved. Accordingly, the provision fails the test.

**Unlimited Shipments With Own Transportation Means By In-State Wineries and Breweries**

Companion provisions added by the 2003 Amendments afford Virginia wineries and breweries the same essential privilege as Virginia farm wineries to ship unlimited amounts

of wine and/or beer to purchasers as long as they use their own mode of delivery. The issue and its resolution are therefore the same as those involved in regard to farm wineries. The statutory prohibition as it applies to out-of-state shippers restricts them to shipping only two cases per month regardless of whether they use their own means of transportation, a clear commercial disadvantage compared to the ability of in-state sources to ship in unlimited quantities by using their own means, an advantage that can only be viewed as "local economic boosterism." *Beskind* at 517. No possible core concern of the Twenty-first Amendment could be served, for example, by prohibiting the winery or brewery located "just over the state line" from delivering a shipment of alcoholic products in unlimited quantity to a Virginia purchaser while permitting the Virginia source that is located farther away to do so. At the very least, less discriminatory means are available to achieve the same purpose by prohibiting the shipment of unlimited quantities regardless of the mode of delivery.

**Restricted Right of Individual Consumer To Bring Wine and Beer Into State**

Interrelated provisions of state law prohibit an individual consumer from bringing more than a limited quantity of alcoholic beverages into Virginia while permitting unlimited acquisition and transportation of such products within the state. *See* Va. Code Ann. §§ 4.1-310(E)(I); 4.1-311(A)(1). As noted by Plaintiffs, a similar regulatory scheme was found to be unconstitutional in *Dickerson v. Bailey* because it "*de facto* restricts how much wine an out-of-state winery may sell directly to Texas residents" while permitting unlimited sales (and related transportation) within the state. 336 F.3d at 397-98.

Although, as noted by the Defendants, the statutory provision(s) that proscribe the limitation were not a subject of the recent legislative amendments that are the basis for the remand in this case, the limitation is necessarily derived from

the basic claims originally made and closely intertwined with those provisions that are directly affected by the most recent legislative action. Accordingly, as *Beskind* teaches, the provision is therefore part of "the total mix" that must be considered. *Beskind* at 518.

The prohibition on the quantity of alcoholic beverages that a consumer may bring into the state is unconstitutional in its disparate impact on interstate commercial trade for the same reasons as articulated by the court in *Dickerson*. In addition, the prohibition cannot be viewed as serving any legitimate core concern of the Twenty-first Amendment unless, of course, one concludes that transportation of unlimited quantities of alcoholic beverages acquired within Virginia necessarily has less potential for intemperance or other abuse than that acquired "over the state line."

**Two-Case-Per-Month Limitation**

Perhaps the most significant change encompassed by the legislative amendments is the repeal of the previous ban on all direct shipments of wine or beer into Virginia from out-of-state and the substitution of a two-case-per customer-per-month "allowance" that applies to both in-state and out-of-state shippers with one qualified exception — Virginia farm wineries that ship to in-state retailers. Va. Code Mn. § 4.1-112.1(A).[16] As urged by the Defendants, such quantity restrictions are commonplace in other states, but there is oth-

[16] The court concludes that the exception for Virginia farm wineries exists, at least in practical effect, because, as previously discussed herein, farm wineries in the state do not have to have a shippers' license to deliver unlimited quantities of the product to Virginia retailers. However, the Virginia retailer that receives such unlimited shipment/deliveries from Virginia farm wineries is restricted by the two case limit in any further shipping to individual customers and, therefore, an equal limitation applies as concerns the ultimate consumer, at least in the practical sense.

erwise no justification offered by legislative history or other authoritative source for the particular limit of two cases per month. (Int. Reply Br. at 13-14). At the same time, the limitation is neutral in its impact in that it applies to all sources, both out-of-state and in-state, with the exception noted in regard to Virginia farm wineries that are nevertheless prohibited from engaging in unlimited shipments to the individual consumer.

Given that there is no facial discrimination as there is with other provisions, the Plaintiffs argue that there is, at the very least, unconstitutional commercial discrimination in practical effect where out-of-state suppliers have to take extra measures, with associated costs, to protect the product from temperature extremes during longer shipping schedules. (Pls.' Mem. at 30-33). Although novel in concept, the Defendants dispute the issue in any event with comparable affidavit evidence and therefore dispositive relief is unavailable *on that basis* at this stage. (VWWA's Mem. Supp. Mot. Summ. J. and Opp'n Pls.' Mot. Summ. J. at 10, 22 (Int. Mem.) (citing affidavit)).

Even though a rationale is lacking for why the limit of two cases rather than one, three, or whatever number was selected, the court cannot categorically say that such a limit, universally applied in order to avoid any Virginia preference, does not serve to promote a legitimate core concern of the Twenty-first Amendment in promoting temperance, at least to some degree, and offering some measure of market control. Accordingly, the court concludes that this sole provision of the amended statute survives constitutional challenge on summary judgment.

**Sale of Virginia Only Farm Wine**
**In State ABC Stores**

The court has previously addressed in detail its position regarding the issue of whether the statutory mandate prohibiting the sale in state liquor stores of any wine other than Vir-

ginia's own passes constitutional muster. (Report & Recommendation, dated July 27, 2001, at 53-57). Plaintiffs argue that the issue is not a subject of the remand because it was not a subject of the legislative amendments. Whether the issue needs to be reconsidered at this stage, the court simply reiterates its previous conclusion. The so-called market-participant exception does not salvage the situation given the state's concomitant regulatory role and the fact that the availability of other wines has been increased by the partial lifting of the direct sale ban is of no avail since any discriminatory impact is forbidden. *New Energy Co. v. Limbach*, 486 U.S. 269, 276-77 (1988).

Furthermore, contrary to Defendants' assertions, this court's earlier analysis is consistent with Supreme Court precedent. *Id.* at 55-56 (citing cases). The state is, in fact, using its "power to restrict consumer choice on the basis of the [s]tate of origin." For example, the consumer who prefers to purchase an out-of-state or foreign vintage, as well as distilled spirits which are only available at state stores, is deterred from buying his favorite wine after he buys his liquor because of the inconvenience involved in going to a separate source. Further, the fact that the consumer can special order from out-of-state for direct shipment of up to two cases per month does not eliminate the lack of choice on site at the store. Finally, the fact that in-state winery products cannot be sold (as opposed to *farm winery* product) does not save the otherwise unconstitutional ban since, again, any degree of interstate discrimination is forbidden. *United States v. Lopez*, 514 U.S. 549, 553-60 (1995).

**Remedy**

*Beskind* also provides a clear mandate for devising an appropriate remedy which can be called a "minimum damage" approach:

> [W]hen presented with the need to strike down one or more of those laws as unconstitutional, we can

> assume that [the state] would wish us to take the course that least destroys the regulatory scheme that it has put into place pursuant to its power under the Twenty-first Amendment. ("Given the special protection afforded to state liquor control policies by the Twenty-first Amendment, they are supported by a strong presumption of validity and should not be set aside lightly"). And as a matter of comity and harmony, we are duly bound to give effect to such a policy, disturbing only as much of the state regulatory scheme as is necessary to enforce the U. S. Constitution.
>
> *Beskind* at 519.

As discussed in this court's earlier report and confirmed in *Beskind*, the unconstitutional provisions of this particular statutory scheme are severable. Va. Code Ann. § 1.17.1(ii). The issue is to determine which interrelated provisions are affected when the entire regulatory scheme is examined in order to identify all offending provisions that may not be violative when considered in isolation and whether to solve the dilemma by striking any in-state advantage so as to even the proverbial commercial playing field by placing the same regulatory burdens on all, or whether to open the commercial door by allowing out-of-state sources the same "favored nation" trading benefits as enjoyed by Virginia interests. Plaintiffs, of course, urge the latter while the Defendants — of course — seek the former. Meanwhile, the Intervenors, representing Virginia wine wholesalers, not surprisingly seek to preserve the so-called three-tiered system of controls ("Import Controls") by agreeing with the state that if anything "has to go," the least disruptive path is to eliminate the more recently-created Virginia preferences and make everyone jump through all regulatory hoops. (Int.'s Mem. at 15-26). Stated another way, any offending provision that has been added to the basic regulatory scheme that has been in place

over time may "simply" be excised in order to return to the basic system.

However, it is easier said than done. For example, in regard to the provision that allows Virginia farm wineries to ship product to retailers without mention of any limit would presumably require the addition of statutory language to affirm that such a preference applies to out-of-state sources as well. Such affirmative relief in the form of adding language to a statutory scheme is beyond a court's authority because of the resulting interference with legislative prerogative. Rather, the only judicial means available is to strike the non-severable provision in its entirety, leaving to the legislature the opportunity to re-enact a revised version without constitutional infirmity, *if* it be so advised. At the same time, any provision deemed violative because of severable language that creates a violative preference can be stricken without offending the legislative prerogative.

**Conclusion**

The Twenty-first Amendment endows the state with broad discretion in matters of alcoholic beverage control. However, that authority is not unlimited. Here, the basic regulatory scheme was established soon after the repeal of Prohibition and remained in place with little change until the state wine industry began to emerge. At that juncture, and in the years that followed, the state legislature promoted and protected the fledgling effort, just as many other state legislatures did throughout the country. However, in doing so, the constitutional line was crossed when preferences were created based solely on situs that cannot be viewed as anything but economic protectionism of in-state interests. Although the legislature has recently made some adjustment, unconstitutional preferences remain. The commercial playing field must be returned to level, be it as before or, as in the case of the monthly-limit per-customer provision, a different — but still level — plane. Accordingly, mindful that relief cannot

be granted judicially by amending a statute, it is recommended that the following provisions be declared violative of the Commerce Clause on their face or in application when viewed in conjunction with the entire statutory scheme:[17]

(1) That portion of § 4.1-112.1 that requires an out-of-state applicant for a wine or beer shipper's license to obtain and maintain the consent of the producer of each brand for the applicant to ship its product while Virginia retailers are excused from doing so, the court finding such a provision constitutionally flawed as part of the overall statutory preference for Virginia producers and purveyors when considered in combination with the other in-state and out-of-state commercial distinctions created by the entire statutory scheme —

> B. *Any applicant for a wine or beer shipper's license that does not own or have the right to control the distribution of the brands of wine, farm wine, or beer identified in such person's application may be issued a shipper's license for wine or beer or both, if the applicant has obtained and filed with its application for a shipper's license, and with any subsequent application for renewal thereof the written consent of the winery, farm winery, or brewery whose brands of wine, farm wine, or beer are identified therein. Any retail off-premises licensee that purchases wine or beer from anyone authorized to sell wine or beer at wholesale for resale in Virginia shall be presumed to have the authorization of such winery, farm winery, or brewery to ship its brands.*

(2) Those portions of § 4.1-207 and 208 that permit Virginia farm wineries and breweries to manufacture,

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[17] The court deems the italicized language subject to being stricken.

sell, ship and deliver unlimited amounts of Virginia-produced wine and beer to retailers while, by its silence, prohibiting out-of-state sources from doing so —

> § 207(5): Farm winery licenses, which shall authorize the licensee to manufacture wine containing 18 percent or less of alcohol by volume and to sell, deliver or ship the wine, in accordance with Board regulations, in closed containers, to (i) the Board, (ii) persons licensed to sell the wine so manufactured at wholesale *or retail* for the purpose of resale, § 4.1-326 notwithstanding, or (iii) persons outside the Commonwealth.
>
> ...
>
> §208(1): Brewery licenses, which shall authorize the licensee to manufacture beer and to sell and deliver or ship the beer so manufactured, in accordance with Board regulations, in closed containers to (i) persons licensed to sell the beer at wholesale, (ii) *persons licensed to sell beer at retail for the purposes of resale, only as provided in subdivisions B 4 of § 4.1-216*, (iii) *owners of boats registered under the laws of the United States sailing for ports of call of a foreign country or another state*, and (iv) persons outside the Commonwealth for resale outside the Commonwealth.[18]

(3) Those portions of § 4.1-207 and 208 that permit Virginia wineries and breweries to sell and deliver unlimited amounts of wine and beer to purchasers as

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[18] The court recommends declaring the provision permitting unlimited sale and delivery by Virginia breweries to cruise lines, etc. to be unconstitutional for the same reasons as it does in regard to retailers.

long as they perform their own deliveries while prohibiting out-of-state sources from doing so —

> § 207(4): Retail off-premises winery licenses to persons holding winery licenses, which shall authorize the licensee to sell wine at the place of business designated in the winery license, in closed containers, for off-premises consumption *and to deliver the wine to the purchasers in accordance with Board regulations. All such deliveries of wine shall be performed by the owner or any agent, officer, director, shareholder or employee of the licensee.*
>
> ...
>
> § 208(7): Retail off-premises brewery licenses to persons holding a brewery license which shall authorize the licensee to (i) sell beer at the place of business designated in the brewery license, in closed containers which shall include growlers and other reusable containers, for off-premises consumption and (ii) *deliver the beer to purchasers in accordance with Board regulations. All such deliveries of beer shall be performed by the owner or any agent, officers, directors, shareholders or employee of the licensee.*

(4) That portion of § 4.1-310 that prohibits Virginia consumers from personally transporting wine and beer in more than a certain quantity into Virginia while permitting transportation of unlimited quantities within the state

> E. The provisions of this chapter shall not prohibit (i) any person from bringing, in his personal possession, or through United States Customs in his accompanying baggage, into the Commonwealth not for resale, alcoholic beverages *in an amount not to exceed one gallon or four liters if any part of the al-*

> *coholic beverages being transported is held in metric-sized containers*, (ii) the shipment or transportation into the Commonwealth *of a reasonable quantity* of alcoholic beverages not for resale in the personal or household effects of a person relocating his place of residence to the Commonwealth, or (iii) the possession or storage of alcoholic beverages on passenger boats, dining cars, buffet cars and club cars, licenses under this title, or common carriers engaged in interstate or foreign commerce.

(5) That provision of § 4.1-119(A) that permits the sale of only Virginia farm wines in state ABC stores:

> Subject to the requirements of §§ 4.1-121 and 4.1-122, [which deal with referenda precluding the establishment of government stores in a county, city, or town having a population of 1,000 or more], the Board may establish, maintain and operate government stores for the sale of alcoholic beverages, *other than beer and wine not produced by farm wineries*, vermouth, and mixers, in such counties, cities, and towns considered advisable by the Board.

It is therefore recommended that the Plaintiffs' motion for summary judgment be GRANTED as to all challenged provisions except the two-case-per-customer-per-month provision, in which case it is recommended that summary judgment be DENIED. It is further recommended that the Plaintiff's motion to supplement the original complaint and to add and delete parties be granted because the proposed supplementation addresses statutory developments in regard to issues derived from the original allegations that have been fully addressed by the Defendants so that they could not have suffered undue prejudice, and because the proposed substitution of parties does not materially change any party's interests. Finally, it is recommended that the court not permit the filing of any answer to the Supplemental Complaint (*if* the

Supplemental Complaint is accepted) because the Defendants' and Intervener's positions have been fully presented in the context of the pending motions.[19]

Let the Clerk forward a copy of this Report and Recommendation to the Honorable Richard L. Williams and to all counsel of record.

It is so Ordered.

/ss/
United States Magistrate Judge

Dated: August 9, 2004

[19] Under Fed. R. Civ. P. 15(d), a court may permit a party to supplement a pleading when, as here, there have been intervening events that make supplementation proper. In addition, the court *may* also allow an adverse party to file a supplemental response. In this case, an answer to the Supplemental Complaint is unnecessary because the issues are all adequately before the court in the context of the subject facial challenge based on the legislative amendments involved. The court has had the ample assistance of Defendants' and Intervernors' written and oral arguments on their respective positions regarding all relevant issues and it is therefore recommended that no responsive pleading be permitted. *See Myers v. Califano*, 611 F.2d 980, 982 (4th Cir. 1980)(resolving a case that was fully briefed and argued).

## APPENDIX D

Article I, Section 8 of the United States Constitution provides in relevant part:

> The Congress shall have Power * * * To regulate Commerce * * * among the several States * * *.

Amendment XXI, Section 2 of the United States Constitution provides:

> The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

Section 4.1-310 of the Virginia Code provides in relevant part:

> E. The provisions of this chapter shall not prohibit (i) any person from bringing, in his personal possession, or through United States Customs in his accompanying baggage, into the Commonwealth not for resale, alcoholic beverages in an amount not to exceed one gallon * * * .

Virginia Code section 4.1-311 provides in relevant part:

> A. The transportation of alcoholic beverages lawfully purchased in the Commonwealth in excess of the following limits is prohibited except in accordance with Board regulations:
>
> 1. Wine and beer, no limitation.
>
> 2. Alcoholic beverages other than wine and beer, three gallons * * *.
>
> B. The transportation of alcoholic beverages lawfully purchased outside the Commonwealth, within, into or through the Commonwealth, in quantities in excess of one gallon * * *, is prohibited except in

> accordance with Board regulations adopted pursuant to this section.

Virginia Code section 4.1-119(A) provides in relevant part:

> [T]he Board may establish, maintain and operate government stores for the sale of alcoholic beverages, other than beer and wine not produced by farm wineries, vermouth, and mixers * * *.

Virginia Code section 4.1-100 provides in relevant part:

> "Farm winery" means an establishment * * * located on a farm in the Commonwealth with a producing vineyard, orchard, or similar growing area * * * or agreements for purchasing grapes or other fruits from agricultural growers within the Commonwealth, * * * where the owner or lessee manufactures wine * * *.